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Ontario
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Decisions

November 83

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0346-83-U Ontario Sheet Metal and Air Handling Group, Complainant, v. Acme Plumbing and Heating, Respondent

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BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and W. H. Wightman.

APPEARANCES: *Martin Addario, T. K. Billings, L. Cianfarani and W. H. T. Wilson for the complainant; K. W. Kort, Joel Trudeau and V. Trudeau for the respondent.*

DECISION OF THE BOARD; November 30, 1983

1. In this complaint under section 89 of the *Labour Relations Act*, the complainant has been dealt with by the respondent contrary to the provisions of section 147(2) of the Act.

2. It is the position of the complainant that it is a designated employer bargaining agency within the meaning of sections 137(1)(d) and 139(1)(b) of the Act and that it has recognized the Mechanical Contractors Association of Kingston ("MCAK") as a Local Association of Sheet Metal Contractors and has delegated to it responsibility and authority with respect to labour relations matters including the levying of assessments for employers covered by the provincial collective agreement between the complainant and Sheet Metal Workers International Conference ("SMWIC") effective from May 1, 1982, through April 30, 1984, and for all previous relevant provincial collective agreements.

3. The complainant alleged that the respondent was bound by the current collective agreement referred to in the preceding paragraph and was also bound by the provincial collective agreements effective from May 1, 1980, to April 30, 1982, and from May 1, 1978, to April 30, 1980. It was also the position of the complainant that the respondent has been party to a series of collective agreements with Local Union No. 269 since at least May 22, 1975.

4. The complainant referred to article 34 of the current collective agreement and Appendix C, clause 18, which require employers bound by the collective agreement to pay an assessment as may be determined by the directors to the complainant. It is the position of the complainant that these payments are to be made through the Local Employer Trade Association (the "Association") having jurisdiction in the area where the work is being performed, whether or not the respondent making such payment is a member of the Association. It was also the position of the complainant that the respondent has continually refused on numerous occasions to pay industry fund assessments required by the collective agreement and Appendix C in the period from June, 1978, to date. It was alleged by the complainant that the amount of assessments owing for the period from June, 1978, to August 31, 1982, is \$10,443.43. The complainant grieved on its own behalf and on behalf of the MCAK that the respondent is in breach of the collective agreement and Appendix C and section 147(2) of the Act.

5. It was the position of the respondent that the Board did not have jurisdiction to deal with this complaint because the complaint and particulars did not disclose any contravention of the Act. The respondent adopted the position that the complainant had failed to promptly bring to the attention of the Board any alleged violations of the Act. Subsequently, the respondent conceded that the Board had jurisdiction to entertain this complaint and admitted its liability for dues and assessments claimed under the provincial collective agreement in the industrial, commercial and institutional sector only. The respondent also informed the Board that it was henceforth prepared to comply with the assessment provisions of the collective agreement with respect to work performed in the industrial, commercial and institutional sector of the construction industry. The respondent also agreed that in terms of the matter of quantum, the onus was on the respondent to establish which work was included in the industrial, commercial and institutional sector of the construction industry. However, the respondent did argue that the delay by the complainant in making this complaint ought to limit the liability of the respondent to pay assessments.

6. Mr. W.H.T. Wilson gave evidence that he has been the secretary of the MCAK since its inception in 1974. In a letter dated February 4, 1977, Mr. Wilson wrote to the complainant the following letter:

Dear Lou:

Re: Industry Fund Collections

There are a group of Belleville Sheet Metal Contractors who collectively refuse to pay into the Industry Fund called for in the Agreement, even though we are covered by an Accreditation Order covering these contractors.

Attached is a report of the situation given to these contractors' representatives at a meeting held in Belleville on January 13th. At that meeting, it was made clear that they were not willing to join the Association nor had they any intention of paying to the Industry Fund.

They feel that there are mitigating circumstances, accept the facts laid out in the report but quote the Ottawa case where the Ontario Labour Relations Board is unable to enforce a breach of the collective agreement when the grievance is between an employer and an accredited employers' organization.

The Association has been unwilling to initiate legal action up to now because, firstly it would tend to lessen the likelihood of reaching an amicable solution to the problem, secondly the amount of money involved is not large, and thirdly a precedent may be established when the Ottawa case is heard later.

Is there anything that your Association can do to advise or help us?

Since this is of general interest and it affects the membership of the Ontario Association and the payments to the Provincial Association,

would you be prepared to provide financial or other assistance if it was decided to take legal action?

The respondent was one of the contractors referred to in the second paragraph of this letter. The reference to the decision of the Board is a reference to *J. G. Rivard Limited*, [1976] OLRB Rep. Sept. 540.

7. On July 16, 1979, Mr. Wilson on behalf of the MCAK wrote to the respondent as follows:

re: Remittances, M.C.A. Kingston Industry Fund

Gentlemen:

As you are aware, we have, on numerous occasions, asked that you remit to the Industry Fund that has been included in Collective Agreements covering Sheet Metal Workers, since 1975.

We have also considered taking action to enforce the Collective Agreement, but have preferred to have you pay your share on a voluntary basis.

As you are aware Ammendments [sic] to the Labour Relations Act covered in Bill 22, provide for Provincial bargaining.

A Memorandum of Agreement was signed between OSM & AH Gp. and the Provincial Council of the Sheet Metal Workers International Association. This agreement came into force on May 29th, 1978 and calls for .10¢ per man hour worked to be paid to M.C.A. Kingston.

O.S.M. & A.H. Gp are insisting that these funds be collected and they are prepared to take action under the Agreement and the provisions of the Ammended [sic] Act.

We would, therefore, request that you send your remittance covering the payments called for on the attached sheet.

If you have any questions or would like to discuss this, I would be happy to call on you at your convenience.

In order that we may advise O.S.M. & A.H. Gp of the status of this account, may we please have your payment by the 15th of August, 1979 for hours worked up to the end of July, 1979.

Remittance Forms are enclosed for current and future payments.

Attached to this letter were calculations for various months in 1978 and 1979 and a claim based on apparent data for six months in the amount of \$588.55. Mr. Wilson had discussions

with Joel Trudeau, one of the principals of the respondent, on August 27, 1979, about the survival of unionized metal contractors in Belleville and referred to the above-mentioned claim.

8. On February 8, 1980, Mr. Wilson again wrote to the respondent on behalf of the MCAK the following letter:

Dear Sirs:

re: Industry Fund

We still have not received payment as request in our earlier letters.

A revised list of payments due under the Provincial Collective Agreement, is as follows:

1978	June	1153	.10	\$115.30
	July	?		
	August	1320		132.00
	September	?		
	October	?		
	November	1050		105.00
	December	1058		105.80
1979	January	1304.50	.10	\$130.45
	February	?		
	March	?		
	April	612	.10	61.20
	May	1004	.10	100.40
	June	?		
	July	1148	.10	114.80
	August	1195	.10	119.50
	September	1100	.10	110.00

May have we your payment.

On April 22, 1980, Mr. Wilson spent an hour in a meeting with Vincent Trudeau, one of the principals of the respondent, and went over the whole situation in the Kingston area and provincially and explained that it was the view of the board of directors that the respondent should pay the assessments. He asked for Mr. Vincent Trudeau's co-operation and explained the certificate of accreditation which covered the respondent and the affects of provincial bargaining. Mr. Wilson testified that Mr. Vincent Trudeau's position was one of understanding but that he was non-committal and appeared not to regard reference to further action as a threat.

9. Mr. Wilson had other discussions with Joel and Vincent Trudeau concerning the payment of assessments. On August 6, 1980, Mr. Wilson again wrote to the respondent on behalf of the MCAK as follows:

Dear Sirs:

re: Industry Fund

Further to our registered letters of July 16th, 1979 and February 8, 1980, we still have not received payment of the amounts listed on the attached sheet.

We would again advise that these payments are not dependant [sic] on membership in the Association, but are called for in the Provincial Collective Agreement between Ontario Sheet Metal and Air Handling Group, and the Sheet Metal Association. Copy of Article 40 of the current Agreement is attached, as is Article 18 of the Local Appendix covering this area.

In order that we may advise OSM & AH Gp. of the status of this account, may we please have payment of this account by September 1st, 1980 for hours worked to the end of July 1980.

If you have any questions or would like to discuss this, I would be pleased to call on you at your convenience.

Attached to this letter was an itemized claim for assessments plus liquidated damages and interest covering the period from June, 1978 to June, 1980.

10. On April 6, 1981, Mr. Wilson again wrote to the respondent on behalf of the MCAK as follows:

Dear Sirs:

re: Industry Fund

Further to our previous letters of July 16th, 1979, February 8, 1980 and August 6, 1980, we still have not received payment of the amounts listed on the attached sheet.

We would again advise that these payments are not dependent on membership in the Association, but are called for in the Provincial Collective Agreement between Ontario Sheet Metal and Air Handling Group, and the Sheet Metal Workers Association. Copy of Article 33 of the current Agreement is attached, as is Article 18 of the Local Appendix covering this area.

In order that we may advise OSM & AH Gp. of the status of this account, may we please have payment of this account by May 1st, 1981, for hours worked to the end of March 1981.

If you have any questions or would like to discuss this, I would be pleased to call on you at your convenience.

Attached to this letter there was a statement regarding "remittances past due" in the amounts of \$458.10 for 1978, \$1,039.25 for 1979, and \$1,317.60 for 1980. The statement, in addition, also claimed liquidated damages and interest.

11. Once more, on November 29, 1982, Mr. Wilson wrote to the respondent on behalf of the MCAK and stated:

Dear Sirs:

re: Industry Fund

We have written on several occasions in the past, drawing your attention to the fact that you have not remitted Industry Fund payments in accordance with Article 33, Body of Agreement and Clauses 18.6, 18.7, 18.8, Kingston Appendix "C" of the Provincial Collective Agreement between the Ontario Sheet Metal and Air Handling Group and the Ontario Sheet Metal Workers' Conference. Copies of the 1978 and 1980 Articles are attached.

During the last few months, the Ontario Labour Relations Board has upheld the right of the Association to collect Industry Fund in similar circumstances.

The Ontario Sheet Metal and Air Handling Group have advised that as signatories to this Agreement, they are prepared to assist us to take this particular case to the Board and have requested that we make a last attempt to collect these Funds.

If we do not receive payment for the amount shown on the attached statement in full, by December 15th, 1982, we will pass this account to Ontario Sheet Metal and Air Handling Group so that they may take the matter to the O.L.R.B.

Attached to this letter was an itemized statement covering the period from June of 1978, until August of 1982 in the amount of \$10,443.43. This amount included monies with respect to penalties. The only response to any of these letters was a response to the letter dated February 8, 1980, when a person, who was believed to be in the respondent's accounting department, telephoned Mr. Wilson. This person said she would speak to the Trudeaus and call Mr. Wilson. However, Mr. Wilson did not receive further calls from this person.

12. On April 22, 1983, the solicitors for the complainant and the MCAK wrote the following letter to the respondent:

Dear Sirs:

Re: Mechanical Contractors Association of Kingston and Provincial Collective Agreement between Ontario Sheet Metal and Air Handling Group and Sheet Metal Workers' International Conference for Locals 30, 47, 235, 269, 392 397, 473, 504, 537 and 562

We act for the Ontario Sheet Metal and Air Handling Group and the sheet metal division of the Mechanical Contractors Association of Kingston.

By virtue of provisions contained in the above referenced Collective Agreement, to which you are a party, by operation of law, you are required to pay an assessment to the Ontario Sheet Metal and Air Handling Group as may be determined from time to time by the Directors of that Group. These payments are to be made to the local Employer Trade Association having jurisdiction in the area where the work in question is being performed, whether or not the Employer making such payment is a member of the Employers' Association.

The Ontario Sheet Metal and Air Handling Group has recognized the Mechanical Contractors Association of Kingston as a Local Association of sheet metal contractors and delegated to it responsibility and authority with respect to labour relations matters including the levying of assessments for Employers covered by the Agreement in your local area.

We understand that notwithstanding frequent demands by the Mechanical Contractors Association of Kingston and the Ontario Sheet Metal and Air Handling Group for payment of assessments levied pursuant to the Collective Agreement, you continue to refuse to meet your obligations as an Employer bound by the Collective Agreement.

As at August 31, 1982, you have refused to pay assessments of \$10443.43.

Accordingly, please treat this letter as a formal demand by our client, the Ontario Sheet Metal and Air Handling Group on its own behalf and on behalf of the Mechanical Contractors Association of Kingston for payment of \$10443.43, being the amount assessed to the end of August 31, 1982 pursuant to the provisions of the Collective Agreement.

Should you fail to remit this amount by certified cheque within ten days from the date of this letter, we have been instructed to institute legal proceedings against you for the recovery thereof.

13. Mr. Wilson gave evidence that there was no collection of the amounts owing by the respondents because it was hoped to resolve the claims without litigation. Two similar claims against employers had been settled without litigation. Mr. Wilson explained that he regarded the outcome of the first *Rivard* case, *supra*, in 1976 as being indecisive and that

with the decision of the Board in *J.G. Rivard Limited and Michel Rivard Plumbing Limited*, [1980] OLRB Rep. July 1009, it was felt that the claim in this complaint should be proceeded with. This complaint was filed in May of 1983.

14. Vincent Trudeau recalled meetings with Mr. Wilson in 1977. He believed that the respondent did not have to pay the assessments, had never heard of the *Rivard* case until this hearing and had attended meetings but had "never given in". Mr. Trudeau gave evidence that the respondent did not respond to the letters because there was nothing to negotiate. He ignored the letters because he thought they were "nit picking". While he saw the amounts and penalties accumulating, he did not seek legal advice and felt the respondent was not legally bound to pay the assessments.

15. The issue for the Board to determine, since the respondent admits its liability to pay assessments under the provincial collective agreement, is to determine the extent of its liability in terms of the period during which the liability arose. The parties have agreed to meet and endeavour to determine the amount owing by the respondent in accordance with the parameters set by the Board.

16. In the *Rivard* case in 1976, the Mechanical Contractors Association of Ottawa (the "MCAO") referred a grievance to arbitration under the provisions of section 112a [now section 124] of the Act wherein the MCAO alleged that J. G. Rivard Limited had breached the terms of a collective agreement in that it had not made certain payments to the industry fund as provided for in the collective agreement. In dismissing the referral, the Board concluded that notwithstanding the fact that the dispute arose out of the wording of the collective agreement, the dispute was a matter arising between two entities of like interest and constituted an internal dispute between them, and not a dispute between "either party" to the collective agreement within the meaning of section 112a of the Act. The Board concluded it had no jurisdiction to deal with the referral. The conventional wisdom in 1976 was therefore that a claim such as the one before the Board in the instant referral would have been unenforceable in a referral to arbitration. Indeed, the decision of the Board in *Rivard* in 1976, was taken to the Divisional Court and the application for review was dismissed on November 23, 1976. The Court stated that it was in complete agreement with the Board's decision.

17. On July 31, 1980, the Board released its decision in *J.G. Rivard and Michel Rivard Plumbing Limited, supra*, ("Rivard No.2"). Once again the MCAO referred a grievance to the Board under section 112a [now section 124]. Once again there was an attempt to recover industry fund dues pursuant to the provisions of a collective agreement. In *Rivard No. 2*, the Board noted changes had been made to section 112a and that additional provisions had been added to the Act under the regime of provincial collective agreements. The Board determined that the non-payment of industry fund dues was a violation of section 134(2) [now section 147(2)] of the Act and that substantive relief was available by grounding a request for relief under sections 79(1) and 79(4) [now sections 89(1) and 89(4)] of the Act. In making its decision, the Board noted the comments of the High Court in *Regina v. Ontario Labour Relations Board ex parte Genaire Ltd.* [1958] O.R. 637, that the Board may exercise any jurisdiction given to it under the Act, notwithstanding that a particular section of the Act is referred to in the formal application.

18. While this matter has been framed as a proceeding under section 89 of the Act, it does bear similarities to grievance procedures in collective agreements where a time limit

has not been set out in the relevant collective agreement. In dealing with such a situation a board of arbitration stated in *Re Canadian General Electric Company and United Electrical, Radio and Machine Workers of America* (1952), 3 L.A.C. 980, at page 982:

Neither the Agreement under which this grievance was filed nor the preceding Agreement contains any time limitations for the filing of grievances. Is there, then, any basis on which a grievance can justly be declared "stale" or "out of time", and thus subject to rejection without consideration of its merits? And if there is such a basis of rejection, is this case within its limits? In considering this problem it is safe to start with the proposition abstract though it may be, that a grievance about an alleged violation of a Collective Agreement should be brought within a reasonable time after the alleged violation has occurred. It should make no difference to the application of this proposition that the grievors were unaware that they had a right to complain, unless they were in some way misled by the Company. A Collective Agreement is binding on the Union and employees as well as on the employer, and it is a chief function of a Union as a Collective Bargaining Agent for employees to be zealous in asserting rights of employees under a Collective Agreement. Absent bad faith on the part of the employer, a Union which misconceives its rights or those of employees and thereby fails to press them, should not be permitted to make a retroactive claim to re-open, after the lapse of a reasonable time, transaction which have been completed, as, for example, cases of piece-work jobs for which payment has been made and accepted without expression of dissatisfaction.

Where the alleged violation by the Company is of a continuing nature, in the sense that the jobs or situations giving rise to the violation are of a recurring kind, it does not follow that failure of the Union or an employee to press for relief on certain of those jobs or matters bars them from raising the question in any subsequent case. Again, the relevant inquiry is whether the claim for relief was made within a reasonable time after the matter in issue arose. It is not, in this Board's view, a tenable principle that waiver of rights in any one case amounts to a complete waiver for all like cases. So long as the Collective Agreement affords a basis for relief against any situation, the party entitled to its benefits may assert its rights or refrain from asserting them in any particular instance, subject, perhaps to estoppel if there has been any misleading representation upon which the other party has relied to its detriment.

19. With respect to the jurisdiction of a board of arbitration to go beyond a current collective agreement in making an award, a board of arbitration has determined it had jurisdiction to give a remedy which dated back almost a decade over several collective agreements. See *Re Clarke Institute of Psychiatry and Ontario Nurses Association* (1982), 5 L.A.C. (3d) 15, 163-4. In the instant complaint the MCAK has shown considerable forbearance in pressing its claims against the respondent. It is also true, however, that up until July of 1980, the complainant had grounds for believing its claim was legally unenforceable following the decision of the Board in *Rivard* in 1976. On the other hand, despite its cavalier attitude, the respondent was constantly kept informed of the claims against it. Without securing a legal

opinion it adopted the policy that if the claims were ignored they might go away. The respondent can hardly claim prejudice since it has been aware of the amounts claimed since 1979 and the claim for liquidated damages and interest since August of 1980.

20. In our opinion, the appropriate balance is to be struck from the date when the Board's jurisprudence indicated that a complaint such as the instant complaint could be successfully presented before the Board. Up until that time, July 31, 1980, the complainant and the respondent, objectively speaking, could have reasonably believed that the claims were legally unenforceable. However, both parties ought to have known with competent legal advice that the claims of the complainant were recoverable before the Board after July of 1980. The violation by the respondent is of a continuing nature, and, it does not follow that the failure of the complainant to press for relief before the Board immediately in August of 1980 bars it from recovery from that date. It is important to bear in mind two factors. Firstly, the respondent has repeatedly been made aware of the claims of the MCAK and such claims have been carefully quantified by the MCAK. On this ground alone there can be no prejudice to the respondent. The respondent was always in a position to investigate and verify these claims. Secondly, the forbearance shown by the MCAK is entirely understandable. With employers who are bound by a common collective agreement there ought to be a common and friendly identity of interests. Repeated attempts at friendly persuasion ought not to be discounted or regarded as a surrender of a legal claim in the circumstances of this complaint – given the identity of interests of the complainant, the MCAK and the respondent in the process of collective bargaining. It is therefore the decision of the Board that the complainant is entitled to recover, together with the penalties which are provided in the collective agreements, the claims it has made against the respondent under the relevant collective agreements the assessments and dues provided which became due and payable from and including August of 1980.

21. The Board remains seized with the complaint pending the inability of the parties to agree on the amount which shall be payable to the complainant.

1320-83-R Wilfred Hector Picardo & Others, Applicant, v. The United Steel Workers of America, Respondent, v. **Almag Aluminum Ltd.**, Intervener

Petition – Termination – Petition containing two columns headed “In favour of termination” and “Not in favour of termination” respectively – Preamble stating that every employee must sign under appropriate column – Petition not substantially defective in whole of circumstances – Minor discrepancies not causing Board to reject petition

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Kennedy and J. A. Ronson

APPEARANCES: *Wilfred Hector Picardo, Lansford Guthrie and Daniel Harding for the applicant; Naomi Duguid and Doug Hart for the respondent; Michael Gordon and E. M. Peacock for the intervener.*

DECISION OF THE BOARD; November 3, 1983

1. This is an application made under section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent United Steel Workers of America (“the union”).

2. The union did not file a reply to the application. The application affects all employees of the employer at its Brampton, Ontario, plant save and except forepersons, persons above the rank of foreperson, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period. These employees are bound by a collective agreement between the union and Almag Aluminum Limited (“the employer”) which expires October 12th, 1983. The petition filed with the application bears the date of September 13, 1983 and is set up in the following form:

TO ALL EMPLOYEES:

THIS PETITION REGARDING TERMINATION OF BARGAINING RIGHTS BETWEEN THE UNITED STEEL WORKERS OF AMERICA, 350 RUTHERFORD ROAD SOUTH, BRAMPTON, ONTARIO L6W 3P6 AND ALMAG ALUMINUM LIMITED, 22 FINLEY ROAD, BRAMPTON, ONTARIO, L6T LA9, IS STRICTLY VOLUNTARY AND MUST BE SIGNED BY EVERY EMPLOYEE WHETHER IN FAVOUR OF OR NOT, IN THE APPROPRIATE COLUMN BELOW.

SEE ATTACHED FORM 17, APPLICATION FOR DECLARATION TERMINATING BARGAINING RIGHTS.

IN FAVOUR OF
TERMINATION OF
BARGAINING RIGHTS

NOT IN FAVOUR OF
TERMINATION OF
BARGAINING RIGHTS

A line drawn vertically between the two column headings divides the balance of the page under the heading into two columns. There are a series of horizontal lines across both columns

to accommodate employees' signatures. The signatures of all nine employees who were in the bargaining unit at the time the application appeared in the left hand column. Union counsel advised the Board at the outset of the hearing that she would be arguing that the form of the petition was defective and, as a result of that defect, the petition did not express the voluntary wishes of the employees who signed it. Thus, within the usual issue in an application made under section 57 of the Act of whether not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the trade union, the application raises the issue of whether the form of the petition satisfies the requirements of section 57(3) of the Act and the Board's Rules of Practice relating thereto.

3. The Board heard the evidence of the applicant Wilfred Picardo and two other bargaining unit employees, Daniel Harding and Keith Guthrie, called by Picardo to testify in support of the application. No witnesses were called by the other two parties. Picardo testified that:

- (1) His wife typed the petition and the Form 17 "Application for a Declaration Terminating Bargaining Rights" pursuant to his instructions.
- (2) His wife called the Board on his behalf to obtain copies of the blank Form 17 and information with respect to the circulation of a petition and the making of an application for termination of bargaining rights.
- (3) He had been in possession of a copy of the Board's publication "A Guide to the Ontario Labour Relations Act" ("the Guide") since the trade union was certified approximately one year ago. From his reading of the Guide, he knew he had to apply for termination of bargaining rights during the last two months of operation of the collective agreement. He also concluded from his reading that the petition would have to be structured in such a way as to give employees a chance to sign whether they were in favour of or against terminating the union's bargaining rights and in such a manner as to indicate their preference. That is why he provided the two columns headed as they are on the petition. He also concluded that the petition had to be accompanied by the completed Form 17 when employees were asked to sign the petition.
- (4) He solicited all of the signatures on the petition on the same day. The first five signatures were obtained in the morning prior to the start of the day shift, the only shift operating at the time, and the remaining four were obtained after the end of the shift. All signatures were obtained outside of the plant in the employee's parking lot or the driveway of the parking lot.
- (5) He asked each employee to read the petition and then to read the Form 17 so as to inform themselves of what the petition was about. Even so, he told them that he was seeking to apply to have the union's bargaining rights terminated and that they were free to be for or against the termination of the union's bargaining rights.

- (6) He said that the four persons who signed the petition after him that morning were all present when he signed it.
- (7) He did not discuss with the employees his plans to make an application for the termination of bargaining rights at any time prior to when he approached them to sign the petition, although he testified that "... it was always around the plant that the employees were against the union".
- (8) He did not discuss at anytime with management the application, petition or his intention to make the application. Nor did he discuss what wage rates would be paid if the union was to be decertified.
- (9) He has not been told by management that it will discuss wages or working conditions with employees if the union becomes certified, but he presumed that each employee would be free to deal directly with management.

4. Daniel Harding testified that he was amongst the first five employees to sign the petition but was not present when Picardo signed it. He read the petition and the Form 17 before signing the petition and knew exactly what he was signing. He told the Board that, from reading the heading on the petition, he knew to sign in the left hand column if he was in favour of terminating the union's bargaining rights and in the right hand column if he was against those bargaining rights being terminated. Harding is a labourer in the bargaining unit and has been employed for approximately seven months.

5. Keith Guthrie is the employer's shipper and receiver and has been an employee for approximately 16 years. He also serves as lead hand in the shop. There are no allegations that he exercises managerial function or that he is reasonably perceived by the other employees as exercising such functions, or that he has any special kind of relationship with the employer which would cause the employees to be concerned that their decision to sign or not to sign the petition would be communicated to the employer. Mr. Guthrie told the Board that he also was amongst the first five to sign the petition and that he was present when Picardo and two of the other five employees signed it, one of whom was Harding. He described the wall of the shop facing onto the employees parking lot as having no windows looking on to the lot. He also told the Board that supervisors used a parking lot on the opposite side of the premises.

6. This application was made under subsection 2 of section 57 of the Act and, therefore, is subject to the provisions of the subsection 3 of the Act. It reads as

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether *not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing* at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that

a majority of the employees desire that the right of the trade to bargain on their behalf be terminated.

(emphasis added)

The application is also governed by section 73 of the Board's Rules of Procedure. That section provides as follows:

73.-(1) Evidence ... of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application ... for a declaration terminating bargaining rights *unless the evidence is in writing*, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) *No oral evidence ... of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).*

• • • •

(4) *An employee or group of employees who has filed a statement of desire in the form and manner required by this section may appear and be heard at the hearing ... in person or by a representative.*

(5) *The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,*

(a) the circumstances concerning the origination of the statement of desire; and

(b) the manner in which each signature on the statement of desire was obtained.

(emphasis added)

7. These sections of the Act and the Board's Rules of Procedure operate to place the responsibility on the applicant to demonstrate to the Board by testimony of witnesses' personal

knowledge and observation as to the circumstances concerning the origination of the petition and the manner in which each signature on it was obtained that "... not less than forty-five per cent of employees in the bargaining unit have voluntarily signified in writing ..." that they no longer wish to be represented by the trade union. The Board has held in its many decisions involving petitions, whether with respect to applications for certification or for the termination of bargaining rights as this application is, that, for it to be satisfied that a petition expresses the "voluntary" wishes of the employees who signed it, the petition must be free of employer support or influence, whether open or subtle and covert, and free of any conduct or representations by petitioners which would clearly signal employer support. It is a safe assumption that petitions signed as a result of threats, coercion or intimidation by petitioners would also not be voluntary.

8. Union counsel argues that the petition is fundamentally defective because the wording "... must be signed by every employee whether in favour or not, in the appropriate column below." makes it compulsory for employees to sign. Furthermore, counsel argues, Picardo admitted that the petition had to be signed by every one whether they were in favour of the application or not. Therefore, since section 57(3) of the Act requires the voluntary signification in writing of employees' support for the application and the petition on its face clearly is not voluntary, it falls outside of the requirements of section 57(3). At best, counsel contends, the words "... whether in favour or not, in the appropriate column below." are unambiguous. Board Member Ronson drew to counsel's attention the unreported decision of a majority of the board in *K-Mart Canada Limited*, [1983] OLRB Rep. April 561, wherein the Board accepted a petition document which, when signed by employees, was devoid of any statement as to the purpose to be served by their signatures. The evidence in that case established that each employee who signed the blank sheet of paper was shown a copy of the Board's Form 17, also blank, prior to signing the sheet of paper. Counsel's response was that, in the instant case, it would have been better if Picardo had used a blank sheet of paper along with the completed Form 17 because that form clearly is an Application for Termination of Bargaining Rights and there would be none of the ambiguity caused by the wording which counsel claims offends the requirements of section 57(3).

9. Alternatively, if the Board accepts the petition document, counsel contends that Picardo has not met the basic onus imposed upon him by section 57(3) of the Act and section 73 of the Board's Rules of Procedure because he has failed to satisfy the requirements of section 73 with respect to the manner in which each signature on the petition was obtained. That result is the consequence of internal inconsistencies in his evidence, contradictions between his evidence and that of Harding and Guthrie with respect to the circumstances surrounding the first five signatures on the petition and his demeanor as a witness, all of which makes his evidence unreliable to such an extent that the Board cannot be satisfied either with his evidence about all of the circumstances under which the petition was signed or his denials of any employer involvement or support for the application and his frequent oral assertions that the employees signed the petition voluntarily.

10. There is no direct evidence of management support for or involvement with the petition and none from which such support or involvement could be inferred. It is not contended that Picardo conducted himself in a manner which could constitute threatening, intimidating or coercing.

11. With respect to union counsel's argument made in the alternative that Picardo failed

to satisfy the basic onus of section 57(3) of the Act that employees' wishes be voluntary and in writing, the Board has examined its record of the testimony of all three witnesses, counsel's representations thereon and, while there are some discrepancies in the details of the witnesses' testimony, these are not of a type which, when seen in the context in all of the evidence and having due regard for the demeanor of all three witnesses, would cause the Board to refuse to rely on Picardo's evidence should the Board find the form of the petition acceptable.

12. That leaves the Board with the more difficult issue of whether the petition is, as counsel for the union contends, so fundamentally defective as not to constitute a voluntary, written signification of employees' wishes. With respect to the wording chosen by Picardo, it might present an insurmountable problem if the petition had been worded to end after the phrase "... whether in favour or not," followed only by the blank space for the affixing of signatures. But that is not its construction. It directs employees to sign "... IN THE APPROPRIATE COLUMN BELOW."; the right hand column if "IN FAVOUR OF TERMINATION OF BARGAINING RIGHTS" and the left hand one if "NOT IN FAVOUR OF TERMINATION OF BARGAINING RIGHTS". Furthermore, inserted between the main part of the petition headnote and the two column headings is the instruction "SEE ATTACHED FORM 17, APPLICATION FOR DECLARATION TERMINATING BARGAINING RIGHTS.". The evidence before the Board is that Picardo told each employee to read the petition and the Form 17 before deciding if he wanted to sign in favour of the application or against it. The evidence of Harding and Guthrie is that they read both documents and it was clear to them that they were to sign in the left hand column if they wanted the union out and in the right hand one if they wanted to keep it.

13. While the phrase "MUST BE SIGNED BY EVERY EMPLOYEE WHETHER IN FAVOUR OR NOT," introduces a potential ambiguity, the form of the petition when viewed in its entirety is not ambiguous in the sense that any employee signing it would be uncertain of the choice which he was being asked to make. Putting it another way, any reasonable employee would have to know that he is being asked to signify, by signing in the left hand column, that he is in favour of the application, or by signing in the right hand column, he is not in favour of the application. The instruction referring persons to the completed Application for Declaration Terminating Bargaining Rights attached to the petition makes the purpose of the petition abundantly clear. The main risk that Picardo and his supporters are taking with this form of petition would be in circumstances where the Board were to be confronted with evidence of employees signing in haste for any reason and having confused the "IN FAVOUR" and "NOT IN FAVOUR" as meaning in favour or not in favour of the trade union, which, if it occurred, would give the employees' signatures the opposite meaning to that intended by the instructions.

14. With respect to the phrase in the petition headnote that the petition "... MUST BE SIGNED BY EVERY EMPLOYEE WHETHER IN FAVOUR OR NOT," constituting compulsion and, therefore, rendering the document not voluntary, the Board does not agree for several reasons. It is correct that Picardo agreed with union counsel that each employee had to sign the petition, but it was his evidence also that he had interpreted the instructions in the Guide to mean that employees had to be given the chance to say whether they were for or against the termination of the union's bargaining rights. He told the Board that he chose this petition format in order to give them that choice. In these circumstances, there is no intent to compel and no evidence that any employee signed the petition because he understood he was compelled to sign. The choice confronting any employee approached by Picardo to sign the

petition was no different than that facing an employee who is asked to sign the more conventional style of petition which simply states that it is in support of an application for termination of bargaining rights or, in the case of an application for certification, is opposed to being represented by the trade union applicant. That choice is to sign or not to sign. The fact that the petition herein says that it must be signed by every employee does not materially alter the choice. It is Picardo who is saying it must be signed, *not* the employer. Picardo is not in the position to influence the employment status of employees and there is no evidence to establish that it would be reasonable for employees to see him in that light. Therefore, there would be no adverse consequences for an employee who refuses to sign in either column of the petition.

15. Of greater importance however, is the fact that the Board has consistently interpreted the word "voluntary" in section 57(3) to mean that the petition is free of actual or perceived employer influence and that employees who sign a petition are not motivated by a perceived threat to their job security or by concern that failure to sign would be communicated to the employer or could result in reprisals. The Board has given that same meaning to the word voluntary when it is used with reference to the Board's long-established practice of accepting *voluntary* petitions when exercising its discretion under the Act to order a representation vote in an application for certification (see *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB May 676). When one bargaining unit employee with no connection to management, real or reasonably perceived, indicates to another bargaining unit employee that he must sign a petition, absent evidence of threats, coercion or intimidation, it does not make his act of signing the petition involuntary.

16. Having regard for the documentary and viva voce evidence before it, the Board is satisfied that the petition filed in support of this application expresses the voluntary wishes of the employees who signed it. The Board is further satisfied that not less than forty-five per cent of the employees of Almag Aluminum Limited in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the United Steel Workers of America on September 26th, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act to be the time for the purpose of ascertaining the number of persons who voluntarily signified in writing that they no longer wish to be represented by United Steel Workers of America under section 57(3) of the Act.

17. The Board directs, therefore, that a representation vote be taken of the employees of Almag Aluminum Limited. Those employees eligible to vote are all employees of the employer at its Brampton, Ontario, plant save and except forepersons, persons above the rank of foreperson, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

18. Voters will be asked to indicate whether they wish to be represented by the United Steel Workers of America in their employment relations with Almag Aluminum Limited.

19. The matter is referred to the Registrar.
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1456-83-R Canadian Paperworkers Union, Applicant, v. Cooper Corrugated Containers Ltd., Respondent, v. Group of Employees, Objectors

Certification – Petition – Practice and Procedure – Timely petition free from management influence or support – Petitioner not offering any credible reason for sudden change of heart – Petition rejected in circumstances

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members W. G. Donnelly and B. K. Lee.

APPEARANCES: *M. A. Church and Ray Bowman for the applicant; Howard Levitt and Geordie Brown for the respondent; no one for the objectors.*

DECISION OF THE BOARD; November 29, 1983

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Based upon the agreement of the parties, the Board finds the following to be the bargaining unit appropriate for collective bargaining:

All employees of the respondent at Rexdale, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.

4. In accordance with the Board's Rules of Procedure respecting applications for certification, the respondent employer has filed a list of employees showing 16 employees in the bargaining unit, together with specimen signatures for employees on that list. Having regard to the agreement of the respondent to three of the four challenges made to such list by the applicant, there are 13 employees in the unit. The parties remain in dispute as to the unit. The membership cards are signed by the employees. The receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date for this application. The money was collected by more than one person and the membership evidence is supported by a duly completed Form 9 statutory declaration concerning the membership documents.

5. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards, which consist of combination applications of membership and receipts. The union filed 9 cards, all of which coincide with the names of employees in the bargaining unit. The membership cards are signed by the employees. The receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date for this application. The money was collected by more than one person and the membership evidence is supported by a duly completed Form 9 statutory declaration concerning the membership documents.

6. An undated timely statement of desire by 8 employees indicating opposition to the application was filed, four names of which coincide with the names of those who signed membership cards. The Board finds this statement to be relevant to these proceedings because if it is proven to be voluntary, it would raise sufficient doubt concerning the continued support for certification of the applicant, by a sufficient number of employees who also signed membership cards, that the Board would generally exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken despite the fact that more than 55% of the employees in the bargaining unit were members of the applicant at the relevant time.

7. The statement of desire (hereinafter "petition") complies in form and substance with Rule 48 of the Board's Rules of Procedure. In accordance with its usual practice, the Board undertook the inquiry contemplated by Rule 48(5) and heard evidence concerning the origination of the petition and the manner in which each signature thereon was obtained.

8. The Board heard evidence from Peter Portelli, a machine operator, who testified he was the sole originator and circulator of the petition. Mr. Portelli was asked why and how he conceived the idea to write and circulate the petition. He gave several reasons, namely:

- (1) that his wife had found out from a piece of paper in his wallet that he had signed a union card and yelled at him;
- (2) that he had been a member of unions (including the applicant) in other work locations and had been dissatisfied with them; and
- (3) that his brother held similar anti-union views and lectured him on the subject.

He had signed a membership card on September 26, 1983 notwithstanding his pre-existing feelings in opposition to unions. He testified several times, in answer to the question as to why he had signed a card if he had felt this way, that he was "confused and upset" by family matters at the time he signed the card. He made no claim that the confusion was due to group pressure or anything done or said by the applicant. His wife discovered he had signed a card by reading the piece of paper in his wallet on September 26, 1983. The lecture from his brother occurred shortly thereafter. He indicated that he realized he had made a "mistake" the same day he signed the union membership card so his brother's lecture appears to have had a marginal impact on his decision to take up the petition. Under cross-examination Mr. Portelli admitted that his wife had a very limited ability to read English but nevertheless could read the word "union" on the piece of paper. Apparently, it was from this she was able to conclude Mr. Portelli had joined a union. Mr. Portelli was clear in his testimony that her yelling was caused by her reading this word as opposed to any conversations between them. Mr. Portelli was asked to confirm whether the piece of paper was a detachable receipt from the applicant (Exhibit "1B") but he could not remember. Mr. Portelli did nothing toward extricating himself from the applicant until the day after Form 6 (Notice to Employees of Application for Certification) was posted on Wednesday, October 5, 1983. On Thursday, October 6, 1983, he claims he telephoned this Board and was advised to read the papers posted in the factory. He was also advised to phone back after he had done so. Mr. Portelli initially testified that he read the papers and phoned back as instructed mentioning nothing of any difficulties he encountered or assistance he needed to follow these instructions. Under cross-examination it was clear to the Board that Mr. Portelli's ability to read the English language is

limited. Mr. Portelli claimed that it was because of such limitations that he decided to copy out Form 6 so that a friend, Tony Vaselo, (hereinafter "Tony") could explain it to him. Mr. Portelli was apparently able to copy Form 6 sometime during Thursday, October 6, 1983. He testified that he was able to do so because of the proximity of the machine he was working on and the posted notice. It appears he did the copying during his working hours. After he had done this and showed it to Tony, his friend advised him as to what the form said. Mr. Portelli phoned the Board sometime on Friday and passed the phone over to Tony. Tony wrote down for Mr. Portelli what information was necessary, i.e., name of company, names of employees, witness and name of the union. Notwithstanding Tony having written this information for Mr. Portelli, he helped Mr. Portelli compose the petition on Friday night. Tony wrote out the heading in English and Mr. Portelli copied it. The heading on the petition is:

WE THE FOLLOWING EMPLOYES [sic] OF COOPER CORRUGATED CONTAINERS AT

439, ATWELL DRIVE
REXDALE ONT M9W 5C3

DO NOT WISH TO JOIN OR BE REPRESENTED BY THE
CANADIAN PAPERWORKERS UNION

When asked to read the heading to the Board, Mr. Portelli could not pronounce "represented" and upon questioning by counsel for the applicant, admitted that he did not have "any idea what the heading means really" and specifically he did not know what "represented" means. He said he wrote it out because of his friend's advice.

9. Pausing at this juncture and assessing the evidence to do with the origination of the petition, the petitioner failed to give a credible explanation for his decision to create the petition. He had signed the membership card notwithstanding longstanding feelings that previously he had not been served well by the applicant and other unions. A claim that he was "confused and upset" by family matters was the only answer repeatedly given for signing the membership card. His realization that he had made a mistake was precipitated by his wife reading and reacting to one word on a piece of paper. Even though he realized his mistake on September 26, 1983, he waited until October 6th to act on it. The action came after Form 6 was posted. There is no evidence he spoke with any fellow employees about his change of heart between September 26th and October 7th to determine whether anyone else had a similar change. He simply "thought" about it.

10. The applicant led evidence to show that Mr. Portelli had been one of a group of employees who had approached the applicant regarding membership. Stephen Lewis, an employee at the respondent, testified that he had spoken to Mr. Portelli about the applicant prior to the meeting held with the applicant where cards were signed. Mr. Lewis assessed that Mr. Portelli and another employee, S. Sultana, were "for the union" so he called the applicant after waiting 2 weeks to be sure their support was real. He claimed to have been advised by Mr. Portelli that the reason for his wanting the applicant to be "in" was because he was unhappy he had to pay for all his fringe benefits. Mr. Portelli denied that he spoke to Mr. Lewis or vice versa before the meeting when Mr. Portelli signed the membership card and denied

that he had expressed any dissatisfaction with the benefit arrangements of the respondent. Another employee, Gus Bilokrely, testified that he perceived Mr. Portelli as "one of the main people who brought the union in". Both Mr. Lewis and Mr. Bilokrely assessed Mr. Portelli's participation in the union meeting when cards were signed up as being supportive of the applicant becoming the representative of the employees.

11. The explanation Mr. Portelli gave of his circulation of the petition was not any more convincing. We were left wondering why the three persons who had signed cards leant their support to Mr. Portelli's petition. Even the circumstances of signing by those who had never signed cards struck us as peculiar. Finally, the explanation as to how the first employee, who did not sign the petition, was approached left us doubting the accuracy of Mr. Portelli's description of when the petition was written up.

12. Starting with the last aspect first, Mr. Portelli testified he raised the petition with the first employee solicited while that employee was being driven home from work by Mr. Portelli on Friday, October 7, 1983. Mr. Portelli claimed he had the petition, written up, in his pocket but did not show it to this employee because he said he wanted to think about it prior to signing. Mr. Portelli testified that his shift ends at 3:00 P.M. In view of his testimony that Tony helped him compose the petition Friday evening, this conversation would be unlikely and it would have been impossible for Mr. Portelli to have the petition in his pocket.

13. Apparently Mr. Portelli was successful in all his subsequent overtures to various employees. With P2 he simply asked for her telephone number, with no explanation as to why he wanted it, and arranged to meet her at her home the next day, Saturday, October 8. He said he asked for her telephone number after work as she stood waiting for her husband to pick her up. In the case of P3 and P4, Mr. Portelli claims that he already had their phone numbers. He telephoned both on Saturday, October 8, and arranged that he meet with each in their respective homes the same day. He did not explain to either why he wanted to visit them at their homes. In the case of P4 he had never been to his home prior to this. P2, 3 and 4 were all asked to sign Mr. Portelli's petition in the same fashion. Mr. Portelli merely explained that while he (or they, as the case may be) had signed for the union before, he (or they) had made a mistake and had to go against the union. None of the three required any more explanation of or discussion about how it was a mistake to join the union. All three signed after Mr. Portelli's brief explanation. P5 signed on Tuesday, October 11, at a restaurant at Highway 27 and Belfield Road. Mr. Portelli claims that he had his phone number already because P5 had sold him some tires previously. Mr. Portelli phoned P5 on October 10th, Thanksgiving Monday, and arranged that P5 meet him sometime after 6:30 a.m. on Tuesday, the 11th at the restaurant. Mr. Portelli gave him no explanation as to why he wanted to meet with P5 and P5 did not ask for any. Mr. Portelli acknowledged he had never met with P5 outside of work before. Initially, under questioning by the Board, Mr. Portelli claimed that P5 was on vacation on Tuesday, October 11th, but when under cross-examination he was asked why someone who was on vacation would agree to a 6.30 a.m. meeting with no explanation, Mr. Portelli changed his story and said that Tuesday was P5's first day back at work after being absent on vacation leave. Mr. Portelli claims he knew that this was his first day back because P5 had told him prior to leaving on his vacation. Mr. Portelli said the same thing to P5 as he said to P2-P4, i.e., that he had signed a union card and now did not want the union. Again there was no elaboration or discussion. P5 signed immediately, after which both Mr. Portelli and P5 went separately to work for their 7 a.m. shift start. P5 was identified in cross-examination as the brother of one of the owners of the respondent. There is no evidence,

however, that he was either actually or perceived as "management". While P5 and Mr. Portelli were meeting in the restaurant, three other employees were waiting in Mr. Portelli's car. Two of these three were prior signatories to the petition and the third eventually signed it. Mr. Portelli denied he told them what he was stopping in the restaurant for and denied discussing the petition with them as a group. He claimed he took this approach because he generally keeps things to himself. Later, under cross-examination, he claimed Tony told him to get signatures one by one. When asked whether any of the passengers in his car asked him why he was stopping at the restaurant, Mr. Portelli emphatically stated that if anyone asked any questions, they would be no longer passengers in his car.

14. P6 signed under equally hard-to-believe circumstances. P6 on Tuesday, October 11th, after the end of the shift (3:00 p.m.) saw Mr. Portelli outside the factory and asked him for a lift home. She had never asked for a ride home from Mr. Portelli prior to this time. During the 15 minute ride to her home, Mr. Portelli claimed nothing was said about the petition. It was only upon their arrival at their destination that Mr. Portelli asked her whether she had read the papers posted in the factory regarding the union. She said she knew nothing of the union and after Mr. Portelli gave the same brief statement as he had made to P1 - P5, she signed. All of this took only a few minutes. P7 was signed up also on Tuesday, October 11th, after working hours. After Mr. Portelli got home that day, he phoned P7. He had previously that day at work asked P7 for his telephone number on the pretext that Mr. Portelli might bring some cassettes to his home that evening. Mr. Portelli claimed P7 had previously recorded some cassettes for him. Mr. Portelli, during the telephone conversation, simply asked whether he could immediately meet with P7. P7 agreed without any question. Considering that the ostensible reason for the meeting was for Mr. Portelli to bring cassettes to P7, it struck us as odd that P7 arranged to meet with Mr. Portelli or met with Mr. Portelli outside P7's home. P7 signed the petition in Mr. Portelli's car after Mr. Portelli showed him the petition and said he would like P7 to sign it. Apparently there was no explanation similar to that given to P2 - P6. P7 did not ask any questions and claimed he was happy to sign the paper. Mr. Portelli gave him a pen and he signed. Mr. Portelli had never previously met with P7 outside their working hours or their workplace. P8 signed in Mr. Portelli's car at 6:45a.m. on Wednesday, October 12. Mr. Portelli normally picked P8 up for work after two other employees, but on this morning, Mr. Portelli had arranged to pick him up first so there could be a one-to-one conversation. Mr. Portelli said he simply showed P8 the petition and P8 immediately said he had had a big problem at his previous work locations with the union. P8 therefore immediately signed the petition. The reason why Mr. Portelli did not raise the petition with P8 on Tuesday was because of the two other passengers in the car and P8 may not have wanted them to know whether or not he signed.

15. Wednesday, October 12th, was the terminal date. Mr. Portelli testified that he knew that he had to have the petition at the Board on this date if it was to be counted. He asked no one to sign after P8 because his friend, Tony, had told him 8 was good enough. Mr. Portelli said his friend only told him this on Wednesday, October 12th. Mr. Portelli was asked by us why, if he thought the petition had to be "down here" by October 12th, he thought sending it by registered mail at around 3:00 p.m. on October 12th would get it "down here" in time. Mr. Portelli revised his previous testimony and stated that he was sending the petition how "they said on the paper" when he sent it by registered mail. Again he claimed his friend, Tony, told him this. Mr. Portelli said he had asked and received permission early on Wednesday to leave work half an hour early due to an illness in the family. This early leaving gave him time to mail the petition on the 12th.

16. Two other aspects of Mr. Portelli's evidence bear highlighting. The first is his recollection of dates. Initially he testified that all of his activities to do with the petition occurred in September. However, upon being shown that he mailed his petition on October 12, 1983, he revised his recollection so that October was the relevant time for the petition. He claimed he had confused the September long weekend with the one in October. In any event, the long weekend formed the focal point of both sets of recollections and we do not find that the confusion in dates undermines Mr. Portelli's testimony. The other aspect we wish to highlight is the participation of Mr. Portelli's friend, Tony, in all steps of the petition's origination and circulation. Mr. Portelli explained that his friend normally lives in New York City and initially claimed he had been visiting Mr. Portelli for a period of 2 weeks commencing either September 11th or 18th. When it was queried how the friend was able to advise him and assist him after Form 6 was posted (October 5th) if the end of his 2-week visit, at the latest, was October 1st, Mr. Portelli revised his recollection of the duration of the friend's visit claiming that his friend in fact visited until October 15, 1983. This revision was materially different from the one regarding the pertinent dates of the petition's origination and circulation. This revision did not constitute a mere change of dates. It entailed a substantive change in the content of Mr. Portelli's evidence regarding the duration of the friend's visit and occurred after Mr. Portelli's confusion of September's long weekend and October's had been straightened out. This revision, along with the others mentioned in previous paragraphs, together with the actual content of Mr. Portelli's testimony, lead us to conclude that Mr. Portelli's explanation was not credible. We were further concerned about the participation of Mr. Portelli's friend, Tony, insofar as Mr. Portelli, in denying any management inspiration of the petition, stated that in fact Tony was the inspiration.

17. The burden of proving on the balance of probabilities that a petition represents a voluntary statement of desire on the part of employees that signed it lies upon the petitioners (see, for example, *Omega Neckwear & Apparel Limited*, [1981] OLRB Rep. July 925; *Leamington Vegetable Growers Co-operative Limited*, [1974] OLRB Rep. June 402). The petition must be proved in such a way as to cast doubt on the reliability of the membership cards, which are taken by the Board as constituting the voluntary expression by employees of a desire to be represented by a trade union (see *Baltimore Aircoil*, [1982] OLRB Rep. Oct. 1387). Generally, the Board will be satisfied that the "change of heart" as expressed by the petition is voluntary if it was free from management influence or support. The short time span between the signing of a membership card and signing a petition against the union dictates that a credible reason for the "change of heart" must be offered. If no credible reason is provided, then the onus of proof is not discharged notwithstanding the absence of any evidence of management influence or support. Section 111(c) of the Act requires the Board, as far as is possible, to protect the identity of both members of the trade union and petitioners. Therefore, in instances of a single petition with multiple signatories, reliance is placed on the evidence of the originator/circulator of the petition to determine the voluntariness of the other signatories' "change of heart". While the originator/circulator can give direct evidence as to the voluntariness of his own "change of heart", the other signatories' actions must necessarily be based on an assessment of the originator/circulator's evidence as to how the signatures came to be affixed to the petition.

18. In this case we have no evidence of management participation or involvement in the petition. The only arguable piece of evidence in this connection was the familial relationship between P5 and the owners of the respondent and it was properly acknowledged by the applicant that this familial relationship, standing alone, would be insufficient to defeat the

petition. However, we are faced with a story which we have not been convinced is credible. The idea for the petition was said to have grown from Mr. Portelli's wife's reaction to seeing a piece of paper with the word "union" on it, the only word Mr. Portelli said she could read, and Mr. Portelli's consequent recollections of how he had really felt about unions, which feelings he had forgotten long enough to allow at least two fellow employees believe he was a willing participant in contacting the applicant with a view to certification. One of these fellow employees believed this for upwards of two weeks prior to contacting the applicant. This forgetfulness only appears to have been terminated by his wife's reaction. We find this hard to credit. We also found it hard to believe that so many of the signatories would have signed the petition with virtually no explanation or discussion in the circumstances described. This is especially puzzling because Mr. Portelli's own evidence indicated that a number of the signatories could not read English and Mr. Portelli himself does not know the meaning of one of the critical words in the heading of the petition. Those that had previously signed cards appeared to need no more by way of explanation or discussion than those who had never signed a membership card. We also note that Mr. Portelli's description of when he first approached an employee regarding the petition is inconsistent with his testimony as to when the petition was prepared (see paragraph 12 above). The Board has indicated on numerous occasions that, in weighing the evidence surrounding a petition to determine whether the petitioners have met their onus of proof, it must look at the totality of the evidence (see *Secord Manufacturing Limited*, [1975] OLRB Rep. Sept. 658). Having assessed Mr. Portelli's total evidence we simply cannot conclude he has met the onus. He has, therefore, failed to convince us that our discretion, pursuant to section 7(2) to call a representation vote, ought to be exercised in these circumstances.

19. The Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of Mr. Dayman. The Board accordingly exercises its discretion pursuant to the provisions of section 6(2) of the *Labour Relations Act* and certifies the applicant on an interim basis as exclusive bargaining agent for all employees of the respondent at Rexdale, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and excluding as well, pending the Board's final determination, the lead hand.

20. A formal certificate must await a final resolution of the composition of the bargaining unit.

ADDENDUM OF BOARD MEMBER W. G. DONNELLY;

I support the decision but wish to state that I feel that Mr. Portelli was somewhat at a disadvantage because he was not represented by counsel nor did he appear to have a very firm grasp of English.

1423-82-R United Brotherhood of Carpenters and Joiners of America Local 2486, Applicant, v. Des-Build Development Limited, Respondent

Certification – Construction Industry – Practice and Procedure – Whether employees employed as carpenters for purposes of count – Board taking one month prior to terminal date as representative period – Considering whether employees in dispute employed as carpenters during representative period – Board permitting list amendment after LRO appointed in special circumstances

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and J. Wilson.

APPEARANCES: *M. A. Church, Dale Chappell and Roger Charette for the applicant; D. L. Brisbin, Hugh C. MacLachlan and A. Rochefort for the respondent.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER J. WILSON; November 30, 1983

1. The applicant is seeking to represent a bargaining unit of carpenters and carpenters' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in Board area #16, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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3. The respondent initially filed a list of ten persons who were described as carpenters employed by it on the date of the making of this application. The applicant adopted the position initially that it had filed evidence of membership with respect to four of the five carpenters whom it believed to be employed by the respondent in the proposed bargaining unit on the date of the making of this application. The Board appointed a Labour Relations Officer to inquire into the list and composition of the proposed bargaining unit. It subsequently appeared that that respondent did not fully appreciate the criteria for designating its employees according to a given trade. The jobs which were undertaken by the respondent utilized a number of employees who exercised various skills and trades from time to time and after reviewing the matter with the applicant and the Labour Relations Officer, the respondent modified its list of employees to two. Subsequently, the respondent adopted the position that there were four carpenters in its employ on the date of the making of this application. The applicant objected to the respondent modifying its list after the appointment of a Labour Relations Officer.

4. In *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618, the Board considered the question of amendments to lists of employees upon challenges before the Board. At page 1619 the Board stated:

8. At the outset of the hearing the Board will generally allow the employer to amend the lists filed to reflect any new information not previously available or to correct any error. During the hearing the Board does not announce the count of employees or any union membership until

the description of the bargaining unit is settled. Similarly it does not announce the membership count until the count of employees in the unit is determined, subject, of course, to such outstanding challenges to the list as may have been made to that point in the hearing. These are rules well known to the parties and articulated in the Board's jurisprudence. (See, *Gwell Investments Ltd.*, [1971] OLRB Rep. Oct. 675; *The Corporation of the Township of Kingston*, [1975] OLRB Rep. Apr. 370; *Inter City Food Services Inc.*, [1976] OLRB Rep. July 388; *Great Windsor Investments Ltd. Windsor Nursing Home*, [1976] OLRB Rep. Sept. 515.) Without these general rules certification hearings would be endless meanderings without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interests. That is why, absent extraordinary circumstances, the Board does not entertain submissions on the structure of bargaining unit or the list of employees in the unit after the point in the hearing when the count has been given.

It is the view of the Board that extraordinary circumstances exist in this application due to the fact that the employees affected by this application exercised more than one skill, and due to the fact that legitimate differences of opinion arose concerning whether the Board should look at the work performed on the date of the making of this application, or on a more representative period with respect to the work performed. The Board therefore permitted the respondent to amend its list of employees as originally filed.

5. In *Pre-Con Murray Limited*, [1969] OLRB Rep. Jan. 1003, the Board considered the question of the issue of the characterization of a trade performed by an employee for the purposes of the *Labour Relations Act* and stated at page 1007 as follows:

10. In the *Nedan Case*, [[1965] OLRB Rep. May 100] and in such other cases as *George Armstrong Co. Limited*, O.L.R.B. Monthly Report, January 1967, p.773, the Board has applied a rule that a person engaging in more than one trade is characterized for purposes of inclusion or exclusion from a bargaining unit by the trade in which he spends the majority of his time. Thus, if an employee does both carpentry and labouring work, he will be characterized as a labourer if he spends the majority of this time doing a labourer's job. Admittedly, in some cases this is a difficult rule to apply because it is sometimes virtually impossible to establish how much time is spent on different types of work. In the *George Armstrong Case* the Board was urged to apply a different rule, namely, if the prime reason for hiring a person is because of a particular skill and if the employee uses this particular skill when needed, then this should be sufficient for the purpose of characterizing that employee's trade or craft. In that case the Board made no decision as to whether to adopt such a rule. It seems to us, on further reflection, that the principle does have some merit, provided the employee is paid according to the trade or craft for which he was hired. For example, it might well be used in a case where it is not possible to determine how much time is spent in doing two different types of work or where the evidence establishes that an employee's time is equally divided between two trades. It may be that

it should replace the majority rule presently followed by the Board. We express no final opinion on this point but will be prepared in future cases to entertain representations with respect to the possible adoption of such a rule.

6. The parties were in disagreement concerning the period of time to be considered as a representative period if the Board did not look at solely the date of the making of the application as being determinative of the craft engaged in by a particular employee. The Board has generally considered a period which was believed to be representative having regard to the nature and duration of the job. In the circumstances of this application it appears to the Board that the one-month period immediately preceding the terminal date of this application is the appropriate period to consider. It must be borne in mind that the period of the jobs affected by this application is measured in months rather than in longer periods of time.

7. The Board faces an additional difficulty on the facts of this application. The jobs affected by this application are not large, and the respondent clearly required and took advantage of the need for flexibility in scheduling work. This meant switching employees from one task to another so that the work could be efficiently performed and so that continuation of employment could be maintained. The employees affected by this application variously describe themselves as carpenters or bricklayers. While they all possess tools and wore an apron where it was thought to be appropriate, it is clear that none of them had any formal training, that is to say, none of them had gone through a formal apprenticeship programme leading to the qualification of a journeyman. The persons who described themselves as carpenters had received their training on various jobs, or from their fathers, with very little supervised and formal training.

8. The evidence of Nelson Rhode, considered on its own, and in the context of the evidence of the other witnesses who gave evidence, presents serious problems with regard to the reliability and credibility of Mr. Rhode's evidence. Mr. Rhode clearly understated and devalued the nature of the work he was performing. He emphasized the work he performed with the tools of the carpentry trade and de-emphasized all other aspects of his work. It is quite clear that he signs time sheets, that he assigns work, may effectively hire employees, awards overtime work, co-ordinates the work on the job, organizes and supervises the sub-trades, and is responsible for the job preparation. The evidence as a whole discloses that he performs a minor amount of work with the carpentry tools. The Board has considered the records of the company which clearly indicate that Mr. Rhode spent, during the month prior to the date of the making of this application, only six or so hours engaged in carpentry work. The balance of his time of almost a hundred and ninety hours was spent on supervisory work or work which involved trades other than carpentry. The Board finds that Nelson Rhode is not properly included on the list of employees filed by the respondent.

9. Fernand Boulanger was challenged by the applicant on the grounds that he was not a carpenter. The evidence establishes that he was initially hired as a bricklayer and then was told some time before this application was filed that his classification would be that as a carpenter. Mr. Boulanger owns both the tools of the trade for a bricklayer and a carpenter and does not remember what type of work he was performing on the date of the making of this application. Mr. Boulanger does not have any certificates or formal recognition in either the trade of bricklaying or in the trade of carpentry. The evidence of the employment records of the respondent indicate that Mr. Boulanger spent about sixteen hours performing carpentry

work and about a hundred and thirty-nine hours performing non-carpentry work. The Board finds that on a fair reading of the evidence before it that Mr. Boulanger was not properly listed by the respondent as a carpenter.

10. There is very little evidence before the Board with respect to Emile Boudreau and Gerald Samson. It is clear that they were both hired as carpenters, and there appears to have been no suggestion in the evidence before the Board that they were not employed as carpenters throughout the one-month period prior to the date of the making of the application. In these circumstances, the Board finds that Emile Boudreau and Gerald Samson are properly included on the list as carpenters.

11. The applicant challenged the inclusion of Wallace Weiss on the list of employees on the grounds that he was not performing carpentry work on the date of the making of the application or during any other representative period. Mr. Weiss was unable to recall what he was doing on the date of the application and stated that he classified himself as a rough carpenter. When he was hired, he was not told the capacity in which he was hired. Mr. Weiss, in his evidence, also described himself as a formwork carpenter and as a jack-of-all-trades. It appears that Mr. Weiss may have been engaged in caulking and sealing on the date of the making of this application. This would normally be considered the work of a carpenter. However, when the Board looks at the work performed by Mr. Weiss during the one-month period immediately prior to the date of the making of this application, it appears that he spent only eighteen hours performing carpentry work and a hundred and thirty-two hours performing non-carpentry work. In these circumstances, the challenge of the applicant is upheld and the Board finds that Mr. Weiss is not properly included on the list as a carpenter.

12. The Board did not receive any direct evidence regarding the work of Claude Cadotte or Gilles Perron. While Mr. Cadotte was regarded by other employees as a carpenter, there is no precise evidence as to the nature of the work he performed. Mr. Perron, on the other hand, was hired as a carpenter. In considering the work performed by each of these employees in the one-month period immediately preceding the date of the filing of this application, the Board finds that Mr. Perron performed carpentry work as opposed to non-carpentry work by a ratio of five to two. The Board therefore finds that Mr. Perron was employed by the respondent as a carpenter and is properly included on the list of carpenters. On the other hand, Mr. Cadotte performed slightly less work as a carpenter as opposed to a non-carpenter, and although the figures are extremely close, the Board concludes that Mr. Cadotte is not properly included on the list of employees as a carpenter.

13. The respondent hired Richard M. Tremblay and Richard R. Tremblay as carpenters. However, while Richard R. Tremblay spent the vast majority of his time in the month preceding the date of the filing of this application in performing carpentry work, Richard M. Tremblay spent approximately one-third of his time during that period in performing carpentry work. In these circumstances, the Board finds that Richard R. Tremblay is properly included on the list of carpenters, and that Richard M. Tremblay is not properly included on the list of carpenters. Aurele Guillemette is a self-taught carpenter who possesses his own tools and is regarded by some of the other employees as a carpenter. He was not sure the work he was performing on the date of the making of this application, although he was pretty sure he was doing clean-up work. Mr. Guillemette performed a variety of jobs, including signalling on the job site. The records of the respondent indicate that in the one-month period immediately preceding the terminal date of this application, Mr. Guillemette spent roughly one-eighth of his

work time performing carpentry work, with the balance being taken up with tasks in the field outside carpentry. In these circumstances, the Board finds that Mr. Guillemette is not properly included on the list of carpenters.

14. The applicant criticized the records of the respondent as being self-serving. It appears to the Board that this criticism is not merited. The respondent produced these records of its work force and informed the Board that these are records used for costing purposes. The respondent utilizes a series of codes for describing, in some detail, the nature of the work performed and the amount of time spent performing the work of each code. While it is possible to dispute the characterization of some of the work as viewed by the respondent, the Board is of the view that the characterization of the work by the respondent into carpentry and non-carpentry work is, for the most part, soundly conceived.

15. In summary, the Board finds that the list of employees, for the purpose of the count, consists of the following carpenters who were at work on the date of the making of this application, namely:

Gilles Perron

Emile Boudreau

Richard R. Tremblay and

Gerald Samson.

16. In this application for certification the applicant filed four combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been received within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

17. The Board finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act.

18. The Board further finds that the applicant filed evidence of membership on behalf of one of the four persons referred to in paragraph 15.

19. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in any bargaining unit that the Board might find appropriate, at the time the application was made, were members of the applicant on November 9, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. The application is dismissed.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I disagree with the majority's finding that only four of the ten persons on the respondent's list of employees were carpenters for the purposes of the count, and the dismissal of this certification application because the applicant filed membership evidence for only one of those four persons. The basis of my disagreement stems from the majority's acceptance of the coding system used by the respondent as reliable evidence of the work performed by them at the relevant times.

2. On my reading of the Board Officer's report and based on the representations of the parties at the hearing, the following is my assessment of who were employed as carpenters at the relevant dates and therefore fall within the bargaining unit and who were not so employed:

- a) I agree with the majority that Nelson Rhode, Fern Boulanger and Wally Weiss are not in the bargaining unit;
- b) I also agree with the majority that Emile Boudreau, Richard R. Tremblay and Gerald Samson are in the bargaining unit;
- c) I find, contrary to the majority, that Richard M. Tremblay, Aurele Guillemette and Claude Cadotte are also employees within the bargaining unit; and
- d) I believe that Gilles Perron was not an employee in the bargaining unit.

3. Richard M. Tremblay's evidence was quite clear and was unshaken by cross-examination. He is an experienced carpenter of twenty years. He was hired as a carpenter on the Stats Canada building in Sturgeon Falls, and his evidence was that the vast majority of his working time was spent doing carpentry work. Richard M. Tremblay's evidence was corroborated by Richard R. Tremblay's evidence. Both of them were hired as carpenters on the same project around the same time, and at the same rate of pay. They both did the same type of work, and both had a labourer working with them. Their evidence is that they were the only two carpenters on the Stats Canada project at Sturgeon Falls. Notwithstanding the evidence of these two persons, the majority finds that Richard R. Tremblay was a carpenter with four years' experience and is included in the bargaining unit, and that Richard M. Tremblay with twenty years of carpentry experience was not employed as a carpenter and is excluded from the bargaining unit. The majority has exclusively relied on the evidence of the code system used by the respondent. I believe that the evidence of these two persons alone demonstrates that the respondent's code system is an unreliable basis for determining what type of work was performed by the employees. In my view, the oral evidence of these employees set out in the Examiner's report, subjected to cross-examination is to be preferred over the respondents' evidence, where that evidence conflicts.

4. Aurele Guillemette's evidence is that he was a carpenter with seven years' experience. He was hired by the respondent as a carpenter at the rate of \$9.50 per hour to work on the Reichhold Chemical project. He also gave evidence that he had worked for the same company on two previous occasions as a carpenter doing similar work. Mr. Guillemette's evidence is that he, along with Claude Cadotte, whom he described as being another carpenter, spent the vast majority of their time erecting and dismantling concrete *forms*. In the case of

these two persons, the majority again accepted the respondent's code system and based on the respondent's records, concluded that both of these persons spent more time on non-carpentry work than on carpentry work. This conflict between the oral and documentary evidence persuades me to believe that the respondent's code system was not an accurate basis for determining the nature of the work performed and thus should not be accepted by the majority.

5. It is a well-established fact that in the concrete forming field of construction, carpenters and labourers work closely with each other. It is often very difficult to distinguish carpentry work from labourers' work when concrete forms are being erected and dismantled. However, the main function of the carpenter is to see that the forms are level and plumb so that the concrete walls will be a properly finished product according to specifications. There is no doubt in my mind from the evidence that both Aurele Guillemette and Claude Cadotte were primarily engaged in carpentry work and should be included in the bargaining unit.

6. The majority found Gilles Perron was employed as a carpenter and therefore came within the bargaining unit. I cannot agree and find it hard to comprehend how the majority can come to this conclusion. Mr. Perron did not give evidence before the Examiner. According to the respondent's list, Gilles Perron was engaged on the Reichhold Chemicals project, the same project that Guillemette and Cadotte were working on, performing concrete forming work. In a letter to Mr. Church, counsel for the applicant, from Mr. MacLachlan, counsel for the respondent, dated March 22, 1983, Mr. MacLachlan stated: "Please also be advised that the company employed 11 unskilled labourers on October 28, 1982, whose rate of pay ranged from \$6.50 per hour to \$7.50 per hour". Along with the letter, Mr. MacLachlan attached a list of the ten persons in question whom they considered originally to be in the bargaining unit. This list included the various rates per hour. It should be noted that Gilles Perron's rate shows at \$7.50 per hour. The respondent, on its own admission through this letter and the list, classifies such a rated person as being unskilled. It is not reasonable, in my opinion, for the majority to find Gilles Perron, a person rated at \$7.50 per hour, was employed in the bargaining unit and, on the other hand, to find that Aurele Guillemette rated at \$9.50 per hour and Claude Cadotte rated at \$9.00 per hour were not. I reiterate that all three of these persons were working on the same project and working on the same type of work, namely, concrete forming. The code system which the majority has relied upon to establish the bargaining unit list should be completely disregarded. The respondent's evidence, based on its code system, is only self-serving and is not accurate.

7. I have thoroughly read the evidence of Mr. Rochefort, the respondent's official who gave evidence about the respondent's computer system which codes various work functions performed by the respondent's employees. Each function is defined by a code number. It was Mr. Rochefort's evidence that on both the Reichhold Chemical project and the Sturgeon Falls Stats Canada project the respondent only had labourers and carpenters employed. Therefore, all of the work performed by the employees should have been either labourers' work or carpenters' work. On my review of the code system classifications, in many areas it does not provide to a practical assessment of what constitutes the various work functions on a construction project. For example, on the Sturgeon Falls project; the Tremblays were engaged in building retaining walls with concrete precast, a self-locking mechanism. The evidence of the two Tremblays was that they each had a labourer assisting them. A masonry saw was used to cut the slabs and then they were set in dry, one on top of the other and levelled by the Tremblays. The respondent through its code #0277 classified this work under walks, curbs and posts. Mr. Rochefort's classification of this type of work is that it is a masonry function. From

my background as a bricklayer and knowledge of the masonry industry, I categorically state that the building of dry slab retaining walls whether they are concrete or wood is not masonry work.

8. On the Reichhold Chemical project the evidence of Aurele Guillemette is that he and Claude Cadotte were engaged in erecting and dismantling concrete forms. However, their work was coded primarily as miscellaneous concrete labour work. From this assessment it is clear, in my opinion, that this coding system cannot be relied upon to establish the work of a craftsman in the construction industry. I suggest that in most, if not all trades, a code could be devised to show that the majority of time spent working would be in the non-craft area, especially in the concrete forming field.

9. It is my finding that the list of employees for the purpose of the count should consist of the following carpenters who were at work on the date of the application:

- i) Emile Boudreau - rate - \$10.75 per hour;
- ii) Richard R. Tremblay - rate - \$10.50 per hour;
- iii) Richard M. Tremblay - rate - \$10.50 per hour;
- iv) Aurele Guillemette - rate - \$9.50 per hour;
- v) Gerry Samson - rate - \$10.50 per hour; and
- vi) Claude Cadotte - rate - \$9.00 per hour.

10. The applicant union filed evidence of membership on behalf of four of the six persons referred to above. I am satisfied on the basis of all the evidence that more than fifty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant on the relevant dates and that the applicant should be certified as the bargaining agent for all carpenters and carpenters' apprentices in the employ of the respondent company in the appropriate bargaining unit.

0018-82-M The Ontario Erectors Association, Ralph M. Moore Industrial Installations Limited and **Dominion Bridge Company Limited**, Applicants, v. International Association of Bridge Structural and Ornamental Ironworkers Local 786, International Association of Bridge, Structural and Ornamental Ironworkers, the Ironworkers District Council of Ontario, those persons listed on Schedule A and V. Boulard, Respondents.

Damages – Reconsideration – Strike – Union seeking reconsideration of decision finding union liable for unlawful strike instigated by union official – Board reviewing duty of different levels of union officials in face of unlawful strike – Confirming finding of union liability and award of damages

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members M. Eayrs and C. A. Balentine.

DECISION OF THE BOARD; November 25, 1983

1. The respondent International Association of Bridge, Structural and Ornamental Ironworkers Local 786 (“Local 786”), by letter from its counsel, has asked the Board to reconsider its decision in this matter which issued April 21, 1983. In that decision, (reported at [1983] OLRB Rep. Apr. 503) the Board found that Local 786, as a result of an unlawful strike by the ironworkers employed by Moore Industrial Installations Limited (“Moore”) and Dominion Bridge Company Limited (“Dominion”) and represented by Local 786, had violated Article 26 – No Strike or Lockout of the ironworkers provincial agreement which, at the time, was binding on Local 786, Moore and Dominion. The Board also assessed damages against Local 786 as a consequence of its violation of the provincial agreement (“the Agreement”) totalling \$18,795.00 payable to Moore (\$181.00) and to Dominion (\$18,614.00).

2. There are three elements to Local 786’s request for reconsideration. First, with respect to its liability for the unlawful strike, counsel for Local 786 contends that the Board has departed from the established factual standards applicable to findings of liability for trade unions arising out of unlawful strikes and the Board has found liability in Local 786 when the Board’s findings of fact “... did not find blame in relation to [Local 786].”. Second, it is contended that the Board’s application of the facts at issue to the question of Local 786’s liability for the strike “... is inconsistent with the concepts of agency as enunciated by the Supreme Court of Canada.”. Third, it is contended that the Board failed to consider uncontradicted evidence relating to the damages claimed by Moore and Dominion when it was assessing damages against Local 786.

SUBMISSIONS

3. The letter from counsel for Local 786 was sent to the other parties for comment and reads as follows:

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Pursuant to the provisions of the Ontario Labour Relations Act, we request, that the Board reconsider its decision as a result of the respondent's claim that the Board failed to consider uncontradicted evidence relating to the question of damages, and conclusions of fact and law which were presented to the Board and have not been dealt with.

With respect, we believe the finding of the Board to have major repercussions for not only the respondent, but all craft trade unions in the Province of Ontario as it relates to the standard of responsibility imposed upon both International Unions, Local Unions, and the individual executive members thereof, when dealing with the responsibilities which they must carry out in the face of an illegal strike.

We believe that the Board in its decision of April 21st, 1983 has departed from the previous factual standard that has been applied against respondent unions, and that this was done in the face of a finding of fact by the Board which did not find blame in relation to the respondent.

As regards the findings of fact made by the Board, there is no doubt that a walk-out was instigated and brought about by the respondent Boulard. The Board made the finding at paragraph 32, however, that Lajeunesse and Verdecchia acted promptly to limit that liability by taking steps over the weekend to ensure an orderly return to work on Monday. The Board later stated in the same paragraph, "While Local 786 officials acted promptly, positively and decisively in that respect, the Board has some remaining doubt as to how they discharged their responsibility under Article 26 to prevent the unlawful strike of their members."

Although making the latter comment, the Board fails to indicate what would have been reasonably expected of the respondent Local and its representatives, given the fact that Verdecchia had already attended at the site and indicated the manner in which the work assignment was to be performed. Verdecchia stated, and the Board has accepted, that if he had suspected that there were to be an unfavourable reaction of his members, he would have stayed in the area to deal with any problems. The Board made a finding in paragraph 33 that one of the stewards, Powers, failed to alert Verdecchia or Lajeunesse to the possibility of the dissatisfaction of the other members spreading. The respondent points out that there was no evidence upon which Powers could have made any assessment that such dissatisfaction was spreading, and no evidence was led in that regard. Further, there was no reason whatsoever for Powers to phone Verdecchia or Lajeunesse on Thursday, as he was aware that Verdecchia was on the building site on that very afternoon. Therefore, there was no logical reason as to why he should contact Verdecchia.

Such a conclusion as was drawn against the steward Powers was also cited in paragraph 16 of the Board's decision and yet again, there is no

logical reason why such a conclusion should be drawn as against such steward, as Verdecchia was on site during the Thursday afternoon.

The Board on the other hand admits in paragraph 34 that "It has the advantage of the accuracy of hindsight," and as a result, in the respondent's submission, lays blame where no blame could be proven. The Board goes on to state in paragraph 34 that "The failure of both Verdecchia and Powers to recognize the circumstances with which they are confronted on Thursday as the forerunner of Friday's strike seems inconsistent with their experience as union officials in their trade."

By taking the approach that it has, it is respectfully submitted that the Board has made a finding unsupported by any of the facts and imposing a degree of responsibility which is wholly unrealistic given the practical realities of the every day functioning of a construction site. The Board's decision may seem attractive in the academic sense or in the sense of attempting to impose a new legislative responsibility on trade unions. However, such an approach to the facts in issue have, with respect, deviated from the established practice of both the Board, and arbitrators, and is inconsistent with the concepts of agency as enunciated by the Supreme Court of Canada.

There was absolutely no evidence to suggest that on the Thursday evening, Verdecchia could have known that there was a reasonable chance that there would be a full scale walkout on the Friday morning. The most that can be said is that Boulard reacted to Verdecchia's instructions in such a way as to let Verdecchia know that he was not happy with the decision concerning the work assignment. That type of reaction is one that union officers see every day when they visit their members on any construction site and it does not necessarily mean that such a reaction is a precursor to an illegal strike. To make such an assumption is to impose a totally unrealistic responsibility, and skill as a "Cassandra", in order to meet the standard imposed by the Board.

At the commencement of the hearing, the Board accepted that the International could be removed as a named respondent. Given the decision of the Board in paragraph 34, there is no logical reason why a finding against Local 786 should not also be applicable to the International as there was as much responsibility in legal terms according to the Board's finding on the International as there is upon the Local. With respect, the respondents submit that the Board has failed to accept that there is no absolute liability upon a Local union for an illegal strike. (See *Re Maritime Employers' Association* (1975) 10 L.A.C. (2d) 225.)

It has been submitted that the essence of the cases that have imposed an obligation upon a Local, or International Union, for the acts of its officers, or stewards rests on the premise that the named individual is acting as an agent of the Local, or International Union, and is seen to act in such a position and have the authority to call the illegal strike. In

the normal situation which has proceeded before the Board, that scenario has unfolded and therefore there is an added obligation on the Local Union to rectify the matter as quickly as possible. One response in many situations is for the union to immediately suspend the job steward apart from taking all the other necessary actions to establish a return to work.

However, the essence of the agency concept is that the person who is dealing with such agent, and in this case the steward, Boulard, must believe that that person has the unfettered right to cause the problems that were created. In other words, that the Board could make a finding of fact that both Dominion Bridge and Ralph Moore could have assumed for legal and factual purposes that Boulard had ostensible or apparent authority. Given the findings of fact made by the Board, that conclusion both factually and legally is impossible to make in the instant case.

It is submitted that the evidence was uncontradicted, that Verdecchia visited the responsible officials of Ralph Moore on the Thursday and indicated the manner in which the job assignment should be carried out, in effect agreeing with the officials of Ralph Moore. Further, Verdecchia's decision was made known to the employee members and such a decision clearly overruled the steward Boulard. The evidence, therefore, confirms that Verdecchia had visited the site on Thursday and thus the only logical and legal conclusion that can be reached is that Verdecchia, being business manager of the Local, had the apparent and actual authority to bind the Local.

In this regard, the respondent cited to the Board the Decision of the Supreme Court of Canada in *Canadian Laboratories Supplies Limited v. Englehart Industries of Canada Limited* 97 D.L.R. (3d) 1. The respondent cited a large number of other decisions which have approached the problem of liability in terms dissimilar to the Board's approach in the instant case, i.e. without taking the approach that "absolute liability" is the test.

Given the decision of the Supreme Court of Canada, including the Chief Justice, in the above-cited case and the Chief Justice's decision in the Polymer award cited by the Board at paragraph 26, it is even more puzzling to understand how the Board could conclude from the facts so found that the Local did not act reasonably in the circumstances and was tainted with activity carried out by an individual who clearly did not have any actual or apparent authority given the fact that Verdecchia had dealt with the matter directly. It is submitted that in the context of a S. 124, which this complaint was, the Board has to find factual and legal responsibility in terms of a breach of the collective agreement. A breach of a collective agreement can only be brought about by an agent acting on behalf of the Local and since Mr. Boulard was no longer the apparent or actual agent acting on behalf of Local 786, it is legally impossible to come to the conclusion that, therefore, his actions bind the Local.

For the above reasons, it is requested that the Board reconsider its decision and the serious impact such decision could have upon the Labour Relations of the Construction Industry.

The Board further goes on to make a finding as to the damages payable by the Local to Ralph Moore and Dominion Bridge. The Board accepts, without more, the claim for overtime submitted by the Complainant, Dominion Bridge, and being in the amount of \$13,120. It is respectfully submitted that such a conclusion is totally contrary to the evidence submitted on the face of the record. Dominion Bridge submitted to the Board, exhibit 4, dated September 14, 1982 and accompanying documents which summarized the amount of total premium time supposedly worked as a result of the shutdown. However, upon cross-examination on such documentation, it became apparent that all of the work which was performed at premium time was performed as a result of other causes during the weeks following the shutdown. For instance, on March 16th, there was a delay in production as a result of snow at 3:30 and there being no clips on the columns to receive the grit 2281. On March 17th work was retarded during the day as all of the holes on various pieces of steel had to be reworked. On March 18th, there were four hours lost time as a result of having to rework the holes again. On March 19th, the erection crew found missing pieces and rigging could not commence because of the late shipment and poorly identified bundles. Without going through the remainder of such documents, almost each and every document for each day of work, where overtime was claimed, showed that some problem which occurred during the day extended the day, thus there was no evidence that could be proven by the Complainant to the effect that the overtime worked on that day was only and purely due to the illegal walkout that occurred on the Friday. In fact, the evidence was that the job was already two months, or more, behind schedule and a new completion date for certain work had been provided by the owner. The evidence further showed that due to the increased efficiency of the respondent employees, the work was completed ahead of the new completion date.

It is respectfully submitted, therefore, that upon a proper review of the evidence as filed, there was no established proof that the company could be said to have suffered a \$13,000 loss as a result of the walkout. In addition, the Board has failed to follow the principle as enunciated in *Canadian Kenworth Company Ltd. and Canadian Association of Industrial Mechanical & Allied Workers Local 14*, a decision of Professor J. Weiler, dated February 22, 1980, filed with the Board. It is apparent from that case, as was admitted by one of the witnesses, that the company would not know whether or not they would make a loss or how much of a loss they would make until the job was completed and the year end finalized. It is respectfully submitted that the Board should not have made an award against the Union, for it did not have any evidence before it of what the company's position was on the contract at the end of the job,

nor what the company's position was at the end of its financial year. Dominion Bridge being a part of the Amca company, one questions whether or not a one day walkout created the type of loss as found by the Board and claimed by the Complainant.

For all of the above reasons, the respondent therefore, respectfully requests that the Board reconsider its decision.

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4. The reply from the solicitors for the International Association of Bridge, Structural and Ornamental Ironworkers ("the International") noted that the complaint had been dismissed against the International and its Ironworkers District Council of Ontario ("the Council") and commented in part as follows:

In the circumstances, since the International Association is neither a party to nor affected by these proceedings, we do not intend to comment upon the request for the reconsideration of the board's decision. We note, of course, the reference to our client on p. 3 of the request for reconsideration but do not treat the submission therein contained, made at this date and in that context, as in any way imputing liability on our client in this matter.

Finally we no longer act for the Ironworkers District Council of Ontario and note that a copy of the subject correspondence has been forwarded to them.

5. The Board received several letters from the respondent, V. Boulard. In a large measure, they dealt with an internal dispute between him and Local 786 in which he was seeking the intervention of the International. He does express in his letters an interest in introducing additional evidence, but it appears to the Board that all of this evidence is evidence which was available to him and to his counsel at the time of the hearing.

6. Counsel for the applicants responded to the letter requesting reconsideration of the Board's decision in the following terms:

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It would appear to the writer that the request for reconsideration does not meet any of the criteria that have been established by the Board in its earlier decisions as governing those cases in which reconsideration should be undertaken.

It is not suggested anywhere in Mr. Green's letter that there is any new evidence which could not previously have been called nor indeed any evidence that was not called at all, nor is it suggested that the parties have not had full and complete opportunity to present all the relevant facts and to argue on all of the issues before the Board.

Under the circumstances, therefore, there does not appear to be any basis upon which the Board should exercise its discretion to reconsider the decision.

It would appear to the writer that what is being suggested is that since the decision is an important one, it should be further reviewed by the Board, however, the writer is certain that the Board has given the matter due consideration in the first instance.

While in essence it is our position that the decision of the Board and the findings of fact made by the Board and inferences drawn by the Board are all fully supported by the evidence and totally warranted by the circumstances of this case, there are a very few points contained in Mr. Green's letter upon which we would like to comment. These are as follows:

1. At page 3 of his letter he suggests in paragraph 3 that there is no reason why the finding with respect to the Local should not be equally applied against the International. Frankly, on the evidence in this particular case, I can think of no more clear set of circumstances where such a position could not be taken.

The Board will recall the evidence of the International representative and the telegram delivered by the International immediately upon its learning of there being any problem whatsoever. The Applicant has not suggested and certainly does not suggest that it would be a warranted or indeed logical or proper extension of the argument to carry it forward to the International.

2. Mr. Green has argued at length that since the Local representative had appeared on the scene and taken a position with respect to the dispute on the work assignment, that this somehow removed Mr. Boulard from his position as an agent of the Local for all purposes and he has stated at page 4 that, "since Boulard was no longer the apparent or actual agent acting on behalf of Local 786, it is impossible to conclude that his actions bind the Local." This is a rather frightening concept and one which could be used to insulate a trade union from any responsibility from the acts of any of its representatives or executive merely by saying that they could not be perceived as acting with the authority of the Local.

In this particular case, it of course would involve making the argument that merely because the business representative had taken a position different than that of Mr. Boulard with respect to the work assignment, this would be taken as communicating not only to the Company but to all others on the job site the fact that Mr. Boulard was no longer an agent of the Local for any purpose and was, therefore, not to be seen as occupying a position which was in any way representative of the Local position when he took all of the actions and made all of the statements that he did on the morning in question causing a large number of employees

to leave the job. Surely, it takes a great deal more than this to divorce the principle from the acts of the agent.

3. With respect to the calculation of damages, once again the points raised are all those which were raised on the basis of the evidence before the Board and the argument addressed to the Board and we simply comment that the Board's award, while in fact probably falling short of reimbursing the Applicants for the whole of their monetary loss, is an award that is fully justified by both the facts and the evidence.

4. We cannot help but also comment that the request for reconsideration has not been made for a considerable period of time following the release of the decision and has really only come at a time when the Applicants have been pressing for compliance with the award.

In summary, therefore, we would request that the Board reject the application for reconsideration without delay.

LIABILITY

7. The several references in the letter from counsel for Local 786 notwithstanding, the Board, in finding that Local 786 was liable for the unlawful strike, has not departed from the arbitral principle that a trade union has no automatic or absolute liability, a principle firmly established by a long line of cases following upon *Re Polymer Corporation* (1958), 10 L.A.C. 31 (Laskin). Some of the more recent arbitration awards which have cited with approval the award in *Re Polymer* are: *Re Maritime Employers' Association* (1975), 10 L.A.C. (2d) 225 (Christie); *Re Charterways Transportation Limited* (1976), 12 L.A.C. (2d) 85 (Betcherman); *Re Canvin Products Limited* (1976), 12 L.A.C. (2d) 146 (Shime); *Re Welland Forge Limited* (1979), 15 L.A.C. (2d) 280 (McIver); *Re Atomic Energy of Canada Limited* (1978), 18 L.A.C. (2d) 302 (Weatherall); and *Re Fish International Canada Limited* (1982), 7 L.A.C. (3d) 25 (Anderson). That principle in *Re Polymer* has been followed also by the Supreme Court of Newfoundland in *Re A-G Newfoundland v. Newfoundland Association of Public Employees* (1976), 12 Nfld. P.E.I. R. 495, 74 D.L.R. (3d) 195 (S.C.) and by other high courts in Canada, a circumstance noted by arbitrator Shime in *Re Canvin*, *supra*. The Court in *A.-G. Newfoundland* accepted that trade unions are not absolutely liable for unlawful strikes, but it is noteworthy that it also clearly asserted at page 206:

“While proof of the strike contrary to the provisions of a collective agreement does not necessarily create an absolute liability, I consider that it does create a *prima facie* case of liability and that the onus shifts to the union to establish those things mentioned in the preceding paragraph.”.

The reference to “... those things mentioned in the preceding paragraph” was in respect of 11 steps which the union, in the Court's opinion, could have taken to avoid liability.

8. A trade union's liability in a strike situation where a collective agreement is in operation is a contractual matter and is different from liability in a tort situation. Therefore, liability is to be determined by resorting to the terms of the collective agreement and interpreting

those terms in light of relevant industrial relations considerations. See *Re Canadian General Electric* (1951) 2 L.A.C. 608 (Laskin) at page 609. A trade union is committed by the acts and omissions of its officers and other officials and its liability in a strike situation during the operation of a collective agreement cannot be limited by pleading that the strike was instigated by an officer or official lacking the power to call a strike. See *Re Polymer, supra*, at page 36. A trade union has an obligation to enforce a no-strike provision in a collective agreement by refraining from instigating, participating or condoning strikes during the term of a collective agreement; by making reasonable efforts to head off a likely strike; and by acting promptly to end a strike. See *Re Polymer, supra* at pages 36 and 44. In meeting this obligation to enforce a no-strike clause, the executive officers of a trade union have a higher order of duty with respect to the enforcement of the no-strike provisions in the agreement than do lesser officials such as stewards and committeemen. Generally, executive officers have a duty to act positively to avoid or end strikes as well as to refrain from instigating, promoting or condoning them, whereas stewards and committeemen have a duty to refrain from encouraging, instigating or participating in strikes during the term of a collective agreement. See *Re Polymer, supra* at pages 36, 39, 40 and 44. Professor Laskin, as he was then, had this to say in *Re Polymer, supra*, at page 39 with respect to the obligations of stewards and committeemen.

“Stewards or committeemen who are put forward by a union as its representatives for department or area grievance adjustment must be expected to know that their very status and function underlines the impropriety as well the illegality of a strike while a collective agreement is in force. Thus it follows that a strike called or instigated by a steward or committeeman in his area is a strike for which the union must accept liability under Article 8.01. Steward action is union action in this respect.”

At page 40 of his award, Professor Laskin ascribes a higher duty to the executive officers of a trade union, that is a positive duty to avoid strikes during the term of a collective agreement as opposed to the duty of stewards to merely not to participate in or encourage unlawful strikes.

9. The judgement in a *A-G Newfoundland, supra*, discusses the liability of a trade union in an unlawful strike in circumstances where the evidence indicates that stewards went on strike and participated in picketing. The collective agreement did not contain a positive responsibility of stewards to uphold the collective agreement similar to that in Article 23 of the Agreement herein. Goodridge, J. comments about the stewards' role in those circumstances at page 208 as follows:

“I am of the opinion that shop stewards have a very special role to play in labour-management relations. It is their function to bring the problem areas to the surface and to clear the air by a frank discussion with management.

In this a shop steward becomes an agent of the union, or in this case, the association. Notwithstanding that they may be elected by a unit, when elected they operate on behalf of the recognized bargaining agent.

Yet in this case, we find the shop stewards not only on strike but actually picketing. *There is no evidence that they were then or at any time thereafter suspended, disciplined, removed from office or otherwise dealt with by the association.*"

(emphasis added)

One of the steps which, according to the Court, the union in that case could have taken to avoid liability was to "...have forthwith suspended the shop stewards".

10. The foregoing arbitral and judicial principles are the ones applicable to the facts in the instant case.

11. The key fact in this case is that the steward Boulard instigated the strike. He admitted this to a senior official of the International during the official's investigation of an allegation that Boulard had shut down Dominion's job on the E.B. Eddy Forest Products Limited project at Espanola, Ontario ("the project"). Boulard admitted that he had been involved in taking the ironworkers off the project; he had gone around the site to where contractors other than Moore were working in order to take their ironworkers off the job; and on his way off the job on the day of the strike, he asked two other stewards for their support.

12. Nor did the Board have to rely solely on the evidence of Boulard's admission in order to find that he caused an unlawful strike. In this respect see paragraphs 30 and 31 of the Board's decision.

13. The evidence before the Board was that Boulard had not been appointed steward by the business agent, in this case Gordon Verdecchia, as provided for in Article 23 of the agreement which is set out at paragraph 25 of the Board's decision. Boulard appointed himself steward for Moore when he arrived on the job and found that there was no steward for the ironworkers employed by Moore. He then went to Moore's office trailer and introduced himself to Ernest Davidson, Project Manager for Moore, as the ironworker job steward for Moore's ironworkers. That is also when Boulard raised the dispute about assigning to millwrights the work of aligning the kiln. Prior to him raising the issue, there had been no dispute about that work on this project. Verdecchia came to the project the next day to deal with the issue. After examining the work, the basis on which Moore had assigned it to the millwrights and having discussed it with Boulard, Verdecchia agreed with the assignment made by Moore. Boulard disagreed with Verdecchia. When Boulard and Verdecchia went together to the kiln an argument erupted there with two Noront steel employees when Verdecchia told them that ironworkers would not be aligning the kiln. The evidence was that they also strenuously opposed his decision. He then left the project without altering his decision. Boulard was well-known to the other members of Local 786 and was known to be the steward for Moore's ironworkers and the person to whom other ironworkers on the project would look with respect to the protection of their work jurisdiction interests on the work being done by Moore. The evidence that Jim Lajeunesse, President of Local 786, was apprehensive that any attempt to remove Boulard from the project might interfere with getting the ironworkers to return to work (see paragraph 31 of the decision), is witness to Boulard's influence in the circumstances existing at the time of the strike. Boulard reported for work on the morning of the strike but did not start to work. Instead, he went to Moore's office trailer and told two of Moore's staff

that he and D'Allaire, the other Moore ironworker, were “wobbling” the job, an unmistakable reference on construction sites to walking off the job or striking. Boulard was with the first group of ironworkers to walk off the project. There were approximately 75 to 80 ironworkers employed on the project, of whom 65 were employed by Dominion. Only 15 of the total ironworkers employed were members of Local 786, 10 were permit card workers out of that local and the remainder were working out of Local 786 on travel cards from other Locals of the International. John Powers, ironworker chief steward for Dominion, with some 30 years experience in the trade, most of that time acting as a steward or chief steward while employed by Dominion, graphically expressed the psychology of the trade with respect to strikes in terms of “You’ve got to understand the trade. When you see your fellow members going out, you’ve got to go with them.”. He also testified that, when you have men from out of town locals on a job and they start to walk off on a Friday, there is no way of stopping them or of getting them back once they are off the job site. He also commented that, when you are working in another local’s territory and the local members go off the job, if you want to work there again, you go with them.

14. In light of that kind of evidence and the standard of conduct adopted in *Canadian General Electric, supra*, for a union under a contractual obligation of the sort expressed in Article 26 of the agreement, the Board found at paragraph 27 of the decision that Boulard had breached the contractual obligations of the agreement (Article 26) and the prohibitions in section 74 of the *Labour Relations Act* which reads as follows:

No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

Because he was an official and agent of Local 786, the Board also found that his actions in breaching the collective agreement and the Act made Local 786 liable for the strike.

15. That was the basis for finding Local 786 to be liable for the unlawful strike. While that basis was sufficient in itself for a finding of liability, the Board observed additionally at the end of paragraph 34 that “... Local 786 might still have been found liable for the strike on the basis of the failure of its officials to properly assess the need for action to avert it.”. Prior to making that observation, the Board had acknowledged at paragraph 32 of its decision that Lajeunesse and Verdecchia had acted promptly and effectively to ensure an orderly return to work on the Monday after the Friday strike, but it also had expressed doubt about how they met their obligations as responsible officers or officials of the union to head off unlawful strikes, particularly so with respect to Verdecchia (see paragraph 33). Professor Laskin in *Re Polymer, supra*, having stated at page 36 that the responsible officers of a trade union have a duty to enforce a no-strike provision of the collective agreement not only by refraining from instigating or promoting a strike but by acting promptly with reasonable efforts to bring a spontaneous strike to an end, had the following to say at page 44 about their duty to head off a likely strike:

“The Board agrees that a union bound by a [no-strike clause] has a duty not only to act reasonably to bring a strike to end, but a duty also to make reasonable efforts to head off a likely disruption. *In assessing the conduct of the responsible union officers, all of whom (save Kahane) were*

employees with their ordinary work to perform, caution must be exercised in interpreting a course of events such as those in review here, lest one substitute hindsight as the test of what should have been done as a matter of reasonable foreseeability."

(emphasis added)

In *Re Welland Forge, supra*, the arbitrator found that there had been an unlawful strike with respect to the October 14th, 1976 day of protest against the Federal anti-inflation legislation and he further found at page 286 that

"... the union did absolutely nothing to prevent the work stoppage or strike ..., and in fact not only took no steps to discourage the said work stoppage, but on the contrary encouraged it."

The arbitrator appears to have relied on the *Polymer* line of reasoning in arriving at that conclusion as did the arbitrator in *Re Charterways, supra*. The issue in that case was whether the union took sufficient action to avert a strike, *not* whether it had called the strike. The arbitrator in that case concluded as follows at page 91:

"Once the strike began, union officials had a duty to act quickly to bring it to an end. Mr. Beckwith took a first step by hurrying over to the meeting of strikers where he told them to return to work. While he did not detail the penalties and fines for an illegal strike under the *Canada Labour Code*, R.S.C. 1970, c. L-1, he did inform the men that they were in violation of the collective agreement and thus open to sanctions. *Nevertheless a declaratory statement that the union is opposed to the strike must be backed up by action.*"

"On the evidence the union did very little. The calling of an executive meeting and the tentative approach to an official of another Charterways union to intercede is not impressive. If the local executive had lost control of the membership at the April 25th meeting, as Mr. Beckwith claimed at the hearing, management and/or the national union executive should have been informed in order that either or both could have exercised disciplinary powers. Neither step was taken. Nor did Mr. Beckwith or the local executive convene a membership meeting within the first few days or make any evidence effort to withdraw stewards and committeemen from the strike."

(emphasis added)

It is significant that the arbitrator in *Charterways* found, as a fact, that the trade union had made some effort to avert an unlawful strike, but this effort was not sufficient to avoid liability.

16. While each of the arbitrators in those three cases were dealing with different fact situations as among the three cases and with the instant case, they were dealing with the common issue of the duty of responsible trade union officers and officials with respect to the enforcement of the no-strike provisions during the term of operation of a collective agreement.

They leave no doubt that trade union officers and officials have a duty to act reasonably to avert unlawful strikes.

17. Verdecchia is a full-time, paid official of Local 786. He has been its business manager for seven years, the key officer in the administration of the union's affairs, particularly with respect to the enforcement of its collective agreements. Local 786 has the administrative authority for the enforcement of the Agreement in the Local's geographic jurisdiction. One of those responsibilities is the appointment of stewards, a responsibility assigned by Article 23 of the Agreement to the "Business Agent", in this case Verdecchia. He had not appointed Boulard as steward. Boulard had appointed himself and Verdecchia must have known that. Yet when Boulard strenuously disagreed with Verdecchia's decision that ironworkers would not align the kiln and the two Noront Steel ironworkers vociferously sided with Boulard, Verdecchia did not act to establish his control and authority. With that kind of challenge to his own authority, Verdecchia should have acted immediately to remove Boulard as steward. It is by no means uncommon in the construction industry for business managers to quite properly resort to such action. Verdecchia did not and he and Local 786 must bear the consequences, one of which, in this case, is liability for the strike.

18. The Board, in assessing Verdecchia's conduct, was not ignoring the caution against substituting hindsight for reasonable foreseeability expressed by Prof. Laskin in the emphasized passage quoted above from page 44 of *Re Polymer*. Verdecchia is not an employee of Moore, Dominion or any other ironworker contractor who, like Powers, had his ordinary work to perform. It is not indulging in hindsight to expect a full-time union official of Verdecchia's experience to weigh the factors at play when he came to the project on the Thursday to deal with the work assignment issue. He knew, or should have known the ease with which a construction site can be "wobbled" on a Friday, particularly in view of the large proportion of out-of-town ironworkers on the project and the psychology of his trade with respect to strikes as evidenced by Powers. Nor, given those circumstances, is it imposing on Verdecchia a standard requiring the skill of a "Cassandra", as Local 786 counsel puts it in his letter, to expect him to conclude that there was a substantial risk of a strike which required of him more action than he took.

19. Counsel's view expressed in his letter that "The worst that can be said is that Boulard reacted to Verdecchia's instructions in such a way as to let Verdecchia know that he was not happy with the decision concerning the work assignment." is a significant under-statement of the evidence. Boulard knew the project and was well-known at least to the members of the Local. Verdecchia would have been aware of that and of the fact that Boulard had been an executive officer of Local 786. Given those circumstances, the strength of Boulard's disagreement with Verdecchia's decision, the support for Boulard's position by the Noront ironworkers and the awareness, which an officer of Verdecchia's responsibility and experience would have, that work assignment disputes are one of the common causes of work stoppages on construction sites, there was ample evidence to alert Verdecchia to the risk of a strike. Therefore it would not be setting an unreasonable standard to expect Verdecchia to anticipate the risk of a strike. Then, in order to protect the union from liability for a strike if one materialized, besides removing Boulard as steward, Verdecchia could have checked with other stewards on the job to see whether the disagreement was localized with Boulard and Moore's ironworkers; instructed the stewards to express his own caution to the members against striking if the disagreement spread; and remained on the job himself or arranged for Lajeunesse to come to the site at the beginning of the shift on Friday.

20. Having regard for the evidence which was before the Board with respect to Boulard's and Verdecchia's conduct, the Board's finding of fact with respect to Boulard having violated the no strike provision of the Agreement and its observations with respect to the potential liability for Local 786 because Verdecchia failed to take adequate and appropriate action to head off the strike do not deviate from the factual standards or the legal principles for assessing trade union liability for unlawful strikes established in *Re General Electric* and the *Polymer* line of cases cited above. Part of the concern of counsel for Local 786 that the Board has strayed from those standards and principles seems to arise, at least in part, from the Board's references in paragraphs 16, 33 and 34 with respect to Dominion's ironworker chief steward, John Powers. The Board acknowledges that the general principle of law with respect to stewards is that they not participate in or encourage unlawful strikes, as opposed to the positive duty of officers to avoid legal strikes and to act promptly and convincingly to bring them to an end once underway.

21. This general principle of law is recognized by this Board. It is a principle which exists, not in a vacuum, but for a purpose as demonstrated in *Re Polymer*, *supra*:

“Spontaneous strikers who find stewards or committeemen in their midst, apparently acting with them and doing nothing to induce them to return to work or terminate any demonstration in which they may be engaged, may reasonably believe that they are enjoying official union support.”

The principle, however, is subject to a reasonable application and arbitrators will show flexibility in applying it. For example, in *Re Fish International Canada Limited* (1982), 7 L.A.C. (3d) 25 (Anderson-Alberta), a board of arbitration recently held a trade union to be liable in an unlawful strike in which a steward failed to take any positive action to avoid a walkout and, in fact, joined the walkout. The arbitrator relied on the rationale quoted above from *Re Polymer*.

22. The Board's comments about Powers were not made to hold him to the same level of duty as Verdecchia and the Board has not concluded that Powers had a positive duty to avoid the strike. That does not mean that the Board had no cause to be concerned about Powers' failure to alert either Verdecchia or Lajeunesse by the end of the day shift the day prior to the strike to the circumstances of which he was aware. The Board disagrees with counsel that "... there was no logical reason for Powers to phone Verdecchia or Lajeunesse on Thursday, as he was aware that Verdecchia was on the building site on that very afternoon". The evidence before the Board was that by the end of the Thursday and after Verdecchia had departed the project, Powers knew that there was a dispute about work on the kiln, that Verdecchia had been to the project to deal with the problem, that Boulard, as ironworker steward for Moore, was upset by Verdecchia's decision that ironworkers would not do the work and ironworkers for Moore, Noront and Comstock disagreed with Verdecchia's decision. It was quite apparent to him that Verdecchia's visit had not resolved the problem. Powers has 30 years experience in the ironworker trade and during that period has been either steward or chief steward on nearly every job he has worked. His testimony demonstrated a keen insight into the psychology and dynamics of how strikes often begin in his trade. He may not have thought the work assignment issue had reached the proportions which would cause a strike the next day. It seems to the Board, however, to be inconsistent with the scope of his experience, his insights into strikes and the information in his possession at the end of the day,

that he did not see any need at least to inform Verdecchia or Lajeunesse of a potential strike risk.

23. The Board has accepted and respectfully agrees with Prof. Laskin in the general proposition in *Re Polymer, supra*, that stewards do not have the same positive duty to avoid unlawful strikes as do higher union officials. While that accepted principle places stewards at the other end of the spectrum of responsibility from executive officers who do have a positive obligation to avoid unlawful strikes, that does not mean, in the Board view, that a steward's responsibility is unalterably anchored at one end of the spectrum. The facts in a particular case could place a steward's responsibility closer towards that of executive officers. The facts in the instant case, in the Board's view, impose a higher or additional duty on Powers than the general proposition stated in *Re Polymer*. That duty is one of reporting the true conditions and facts with respect to compliance with the provisions of the Agreement, including the provision in Article 26 prohibiting strikes during the term of the Agreement.

24. It is proper for several reasons to impose on Powers a reporting duty in addition to his general responsibility not to engage in an unlawful strike. First, he clearly had the authority to report. With authority comes responsibility. That responsibility to report in this case was triggered by the fact that Powers was aware of Verdecchia's visit to the site to deal with the work assignment issue; he was aware of the dispute and Boulard's connection with it; he was aware at the end of the day that strong opposition remained to Verdecchia's decision that ironworkers would not do the work at issue; he has long experience as a steward in the trade; knows or should know the sensitive relationship between work assignment disputes and unlawful strikes and is keenly aware of the dynamics of unlawful strikes in his trade. Second, it makes industrial relations sense for parties to be held accountable for violating their obligations arising from a collective agreement. A person in a position of authority with an employer or trade union bound by a collective agreement should exercise his authority, to the extent it exists, as a reasonable person would. Power's failure to report what he knew of the extent of disagreement with Verdecchia's decision existing at the end of the shift on the day before the strike was not reasonable in the circumstances. Third, the Board's conclusion that Powers has a duty to report is reinforced by the parties' voluntary imposition of such a duty on stewards in Article 23:

“... [The steward] shall see that the provisions of this Agreement are complied with and report *the true conditions and facts*”.

(emphasis added)

That statement encompasses more than a mere duty to comply with the Agreement, but the Board does not need to rule on what it encompasses except to conclude that it imposes a reporting duty on Powers.

25. With respect to the comment in the reconsideration request that “... there is no logical reason why a finding against Local 786 should not also be applicable to the International as there was as much responsibility in legal terms according to the Board's finding on the International as there is upon the Local.”, the Board only has this to say. The Board, at the commencement of hearing, did not accept, as stated by counsel, that the International could be removed as a named respondent. The applicants sought leave of the Board to withdraw the application insofar as it pertained to the International because of assurances they had

received about the International's conduct with respect to the strike. The Board refused consent and dismissed the application with respect to the International because of the stage of the proceedings.

26. Counsel for Local 786 contends that the cases which have imposed an obligation upon a trade union for the acts of its officers or stewards rest on the premise that the officer or steward is acting as an agent of the trade union and is seen to act in such a position and is seen to have the authority to call the strike at issue. Counsel asserts that the essence of the agency concept is that the employer who is dealing with such agent (Boulard in this case) must believe that the agent has the unfettered right to cause the problems that were created by actions of the officer or steward. Counsel takes the position that the Board erred in its decision in that it did not properly apply the principles of law with respect to agency as it relates to the facts of this case. The concepts of agency and the issues of ostensible or apparent authority to which counsel frequently referred in his reconsideration request were argued before the Board. They were not addressed by the Board in its decision and it is readily apparent from the decision that they were not addressed because they were not relevant to the fact situation before the Board. The concepts of agency asserted by counsel apply to circumstances, for example, where parties are concluding a contract or some similar transaction. What the Board is dealing with here is a situation where an official of Local 786, Boulard, its members and other ironworkers within its administrative jurisdiction under the Agreement have unilaterally acted against their employers Moore and Dominion in violation of the Agreement binding on those persons and the employers. It is quite clear from the awards in *Re General Electric* and *Re Polymer*, *supra*, and the cases which followed them, that the arbitrators were dealing with a trade union's liability within the contractual framework of a collective agreement which contained a prohibition against strikes during its term, or was deemed by statute to contain such a provision. That is the relevant contractual framework here and what is important in that framework is not how the employer views the actual or ostensible authority of stewards or other officials or officers of the trade union, but how the employees view it. As Professor Laskin stated in *Re Polymer*, *supra*, at page 39:

"... Spontaneous strikers who find stewards or committeemen in their midst, apparently acting with them and doing nothing to induce them to return to work or terminate any demonstration in which they may be engaged, may reasonably believe that they are enjoying official union support."

27. This point is brought home by referring to the case cited by counsel for Local 786 in support of his agency argument. In that case, *Canadian Laboratory Supplies Limited v. Englehard Industries of Canada Limited* (1979), 97 D.L.R. (3d) 1 (S.C.C.), the issue was whether the agent of a company had the authority to enter into a contract with another party. That case is entirely distinguishable. The issue of ostensible and apparent authority is simply inapplicable to the instant case, unless viewed in the context of *employee* perception. The *employer's* perception is irrelevant at this point, because the contractual arrangement (i.e. the collective agreement) had already been completed. The sole issue, then, was whether one party to that agreement was in breach. As a result, this Board had to determine on the facts whether Local 786, as represented by its officers, violated the Agreement. The perceptions of the employer as to which official had the authority to act on behalf of Local 786 is really quite irrelevant, as we are not dealing with a consensual arrangement whereby the parties' perceptions and intentions become relevant. The question which the Board was required to answer was

whether Local 786 was liable for the unlawful strike as a result of the actions of its steward Boulard or other officers in light of their respective duties under Articles 23 and 26 of the Agreement. Those duties derive from an interpretation of the agreement and the principles which the Board has found to be relevant to the facts of this case are those set out in the cases referred to above, cases which also rely primarily on interpretation of the collective agreements in question. Upon applying those principles to the facts of this case, the Board found Local 786 to be liable for the unlawful strike. It did so on the ground that Local 786's steward, Boulard, instigated the strike, a ground by itself sufficient to hold Local 786 liable. The Board also found that Verdecchia's failure to assess the risk of the strike occurring and to take measures to avert it commensurate with his experience and his authority as a union executive was a sufficient further ground for finding Local 786 liable for the strike. Liability thus established, it became necessary to assess damages.

DAMAGES

28. Paragraphs 40, 41 and 42 of the Board's decision set out the premise for Dominion's schedule catch-up claim for the time lost on the day of the strike together with its evidence supporting the premise and the claim, all of which was accepted by the Board. The documentary evidence to which the reconsideration letter refers consists of daily work reports containing comments on weather conditions and on problems encountered during the shift and recording the duration of the shift in hours and, if less than eight hours, the reason why. They also record the number of ironworkers, amongst others, who worked the shift. The submission on that evidence contained in the reconsideration letter were made by counsel for Local 786 in the Board's hearings on those matters. Counsel for the applicants and for Boulard also made submissions on that evidence in the hearings. The Board had considered those submissions when it acknowledged in its decision that the daily work reports did not specifically connect the overtime hours worked on any specific day to catch-up from the strike and also when it went on to find that the overtime recorded on those reports for the relevant period after the strike was consistent with Dominion's viva voce evidence that, because of the strike, it had had to resort to overtime in order to meet the extended completion dates set by E. B. Eddy. In the Board's view, the assumptions underlying Dominion's claim for the cost of making up for the schedule delay caused by the strike were reasonable in the circumstances and its calculation of those costs was practical and reasonable.

Dominion's evidence satisfied the Board on a balance of probabilities that, but for the strike, the financial losses which it claimed to have suffered would not have occurred.

29. The Board, having examined anew the position taken by counsel for Local 786 on Dominion's assumptions and its supporting evidence, finds no reason to change its view. The fact that Dominion's documentary evidence did not establish that the overtime worked after the strike was, in counsel's words, "purely due" to the strike is not sufficient grounds for the Board to refuse altogether Dominion's claim. In this respect, the Board finds the comments of Prof. Laskin at page 1093 in *Re General Electric, supra*, to be quite appropriate to the circumstances of the instant case:

On balance, the Board is of opinion that the very occurrence of a work interruption in an established business which was operating at an annual profit and had been so operating over a number of years immediately

preceding, was a sufficient ground, in the absence of contradictory evidence, to enable it to inquire into the actual amount of loss. Insofar as this amount involved a claim for lost profits, *the Board cannot reject the claim by reason only of difficulty in precise ascertainment*. The evidence furnished by the Company may not be the best way of proving that profit loss but a practical calculation based on examination of records made available to Mr. Hutchinson's firm. This Board is entitled to act on the calculation so submitted, although it may make allowances in favour of the Union to ensure against inaccuracies and overestimation by reason of the assumptions underlying the Company's chosen method of proof.

(emphasis added)

30. Counsel contends as well that the Board failed to follow the principle enunciated in *Re Canadian Kenworth Co. Limited*, an unreported decision of Prof. J. Weiler which issued February 22, 1980, and was discussed in *Current Labour Developments*, January 1981. That award, according to counsel, stands for the proposition that damages claimed for expenses incurred from a strike cannot be properly determined until the employer's year end when it can be seen whether the claimed expenses caused some reduction in profits. It is obvious from paragraph 36 of the decision in the instant case that the Board rejected that proposition. It is likewise obvious that the Board accepted and applied the proposition that, since Moore and Dominion were working under fixed-price contracts, proven, additional costs incurred because of the strike would reduce the mark-up (or profit) remaining between the fixed price of the contracts and the costs on which they were bid. If the additional cost can be established reasonably at the time it is incurred, waiting until the financial costs are final at the end of the fiscal year, or in the case at hand, until the job has been completed, is unlikely to add any greater certainty to the calculation. There is no particular magic to the fiscal year end or the end of a job which says that is the only time or the proper time when damages can be accurately measured. Depending upon the specific circumstances, the impact of the extra costs on profit may be more obscure at either of those two end points. For example, the evidence before the Board was that there would be no profit left in the job by the time it would be completed. If in fact Dominion were to suffer a loss on the job which was less than the amount it has claimed as extra overtime costs, that would not establish that Dominion only incurred overtime costs equivalent to the loss. If Dominion's labour costs of doing the job exceeded the bid cost by, say, \$15,000, that would not be better proof that it incurred the \$13,120 for the overtime cost of making up for the delay in the schedule. Nor would it prove that overtime costs were not incurred as a result of the strike if Dominion had brought the job in at \$15,000 under the bid cost.

31. The important condition in the Board's opinion is whether the claimant establishes an assumption for its claim which withstands a test of reasonableness in all the circumstances at play. Dominion was behind schedule on the extended completion dates already when the strike occurred. The strike put them a further 640 manhours behind. It decided to work overtime to catch-up. The Board has found that the evidence before it supports the claim that Dominion worked at least that number of manhours at overtime rates for that purpose. Were it not for the unlawful strike of its ironworkers for which the Board has found Local 786 liable, Dominion would not have incurred that extra cost. Therefore it was entitled to claim damages equivalent to those costs and the Board was entitled to award the damages. An argument might be made in a suitable fact situation that an employer like Dominion could have a supportable

claim even if it was on schedule or ahead of schedule on a fixed-cost construction job when an unlawful strike took place. It is not uncommon in the construction industry for a contract to provide for payment of a performance bonus if the contractor brings the job in on time or ahead of time. Would it be unreasonable for a contractor which was in a position where the bonus was still attainable at the time of an unlawful strike to schedule overtime work after the strike for the purpose of restoring its position to what it was before the strike and then claim as damages the extra cost incurred?

32. It cannot simply be said that the entitlement to damages can be determined only when a particular operation has completed its particular business cycle. That might, in fact, be the most difficult time to accurately assess damages because so many intervening events may have impacted on the profit or loss of the operation that the financial impact of the strike is obscured. In other fact situations, the financial impact of the strike might be accurately determined only after the business cycle has been completed. What is significant is whether the particular facts make it possible to determine the damages with reasonable accuracy at the point in time when the arbitrator is dealing with it. In the case at hand, the Board was satisfied that the necessary calculations to establish damages could properly be made on the evidence before the Board and at the time the claim was being heard.

33. The Board did not consider the principle for which counsel for Local 786 states the *Re Canadian Kenworth* award stands to apply to the fact situation herein. That award was preceded by *Re Mansfield – Denman General Company Ltd.* (1978), 18 L.A.C. (2d) 155 (Hinnegan) in which the arbitrator declined to award damages claimed to have resulted from an unlawful strike on October 14, 1976, the “National Day of Protest”. At page 159 the arbitrator describes the issue before him as:

... whether the company suffered a loss as a result of the one-day strike and, in our view, that determination cannot be made without an examination of the company’s profit and loss position for the relevant period.

Later on the same page, the arbitrator observes that:

...it does not automatically follow that one day’s *interruption of production* resulted in a net *loss of production* and an ensuing loss of net revenue.

(emphasis added)

Finally, on page 161 the claim for damages is dismissed with the following comments:

Accordingly, the company has not established that, but for the interruption in production on October 14, it would have been in a better position monetarily than it was given the fact of the work stoppage, thereby falling short of satisfying its onus of establishing the fact of loss or damage resulting from the work stoppage.

(emphasis added)

The result for all practical purposes is identical to the result reached by Prof. Weiler in *Re Canadian Kenworth*, *supra*, some two years later. The arbitrator in *Re Mansfield-Denman*, *supra*, on the way to reaching that conclusion commented as follows at page 159:

In our view, such continuing costs or expenses can only become a loss if the production, and the resulting revenue from that production, which would have taken place on the date in question was irretrievably lost to the company and which would have been otherwise realized on that day to cover or offset those fixed costs. In other words, *if total production and revenue is no different at the end of the appropriate fiscal period during which the day in question fell than it would have been had full production continued in the normal course on that day, then the company would have been in no different monetary position with or without that interruption in production, and there would have therefore been no loss or damages flowing from the work stoppage.*

(emphasis added)

34. Those last quoted comments of arbitrator Hinnegan and his earlier comments that a "... net loss of production and an ensuing loss of net revenue." do not automatically follow from a day's loss of production may have been justified by the particular facts before him. On those same facts and for the reason that loss or damage may not have been measurable at the time in question, the employer may not have satisfied its onus of establishing the fact of loss or damage. But this Board does not see his comments and conclusion in that case as standing for the general proposition that loss or damage flowing from an unlawful strike cannot be measured until the end of the appropriate fiscal period. Nor does the Board agree with the general proposition implicit in the emphasized passage of the last quotation above that no damage has been suffered if, at the end of the applicable fiscal period, the employer was in no different monetary position with or without the strike. The question is whether the impact of the strike can be quantified at a point in time relevant to the claim being asserted so that damages are known. In the case at issue an analysis of Dominion's financial results at its fiscal year end would be irrelevant. Dominion's contracts at the project are discrete from the rest of its enterprise and the impact of the strike on those contracts is the issue which the Board has had to address. Even if the fiscal period end is the relevant time, the mere fact that "... total production and revenue is no different ..." does not mean that there has been no adverse financial impact from the strike. The "no different" result may have been the composite result of many factors intervening since the strike and totally unrelated to it. It is an equally valid proposition that but for the strike, costs would have been lower and profits higher or losses lower. The problem is to identify what the result might reasonably have been, but for the strike.

35. Prof. Laskin was addressing that problem in the passage quoted above from his award in *Re General Electric*, *supra*, and in so doing appears to go against the ratio, some 30 years later, in *Re Canadian Kenworth* and *Re Mansfield-Denman* that a loss of profit could only be established, in a claim for damages as a result of an unlawful strike, at the end of the fiscal period. In *Re General Electric*, Prof. Laskin awarded damages for expenses continuing during the strike and for loss of profit. Ten years later he referred to that award in

awarding damages for a loss of net operating profit and for continuing expenses in *Re Husband Transport Company Limited* (1962), 13 L.A.C. 266 (Laskin). Prof. Laskin sets out the formula for calculating compensable losses at page 274:

This method of calculating compensable loss reduces itself to the following: the company would have gained \$3,600.00 in revenue had there been no strike. It would have had to lay out a certain amount for wages to gain that revenue and certain sums for overhead expenses which it saved in this particular case (e.g. cost of gasoline and servicing of vehicles). The total of the sums not paid is deductible from the total revenue not gained; the balance is the extent of the liability;

He later comments also at page 274:

However, where workmen are involved in a manufacturing or service industry and the labour element in the operation is joined to other organized elements of the operation to produce the product or render the service, it is quite reasonable to charge the defecting workers with the value of the wasted overhead charges which cannot be halted and which would have been returned in the revenue that would have resulted had the labour force continued to work under its contract commitment.

Those comments, his formula for calculating compensable losses and his awarding of damages for loss of net profit and continuing expenses suggest that Prof. Laskin still was not anticipating the approach later to be taken in *Re Canadian Kenworth* and *Re Mansfield - Denman*.

36. Those two awards appear to have contradicted without distinguishing Prof. Laskin's awards in *Re General Electric* and *Re Husband Transport*. Moreover, in *Re Canadian Kenworth Company* (1980), 26 L.A.C. (2d) 279 (Williams), which for clarity and ease will be referred to as *Canadian Kenworth (No. 2)*, the arbitrator effectively overrules the point of view expressed by Prof. Weiler in the earlier case. This award was not argued by counsel for Local 786, either in hearing before the Board or in the letter requesting reconsideration. The company in *Canadian Kenworth (No. 2)* was claiming only the overhead expenses which would have been recoverable from lost revenue attributable to the lost production, although it asserted that it could have claimed for loss of profits as well.

37. Arbitrator Williams, after seeking to distinguish Prof. Weiler's *Canadian Kenworth* decision on other grounds, finally overruled him with the following comments at page 287 before awarding damages to the company as claimed:

It may be that the *Mansfield* decision and Mr. Weiler's decision which follows it are distinguishable, because in neither does there appear from the award to be any evidence as to what revenues might have been earned from the sale of the product, or whether the overhead would have actually been recouped. I must say though that in respect of the *Weiler* decision, if the evidence was similar to that before me, then regrettable though it may be, I must follow the dictates of my own reasoning and conscience and, with respect, differ from his conclusion.

(emphasis added)

The arbitrator had dealt as well with *Re Mansfield – Denman* before concluding that it was unnecessary to await the end of the fiscal year to calculate and award damages. In the course of dealing with the *Mansfield – Denman* award, the arbitrator in *Canadian Kenworth (No. 2)*, at page 285, quotes the dissenting opinion in *Mansfield-Denman* and appears to approve its reasoning:

... to suggest otherwise is to say that unions may indulge in any number of *short* work stoppages with impunity, if it can be shown that the company, by whatever means, was able to make up the lost production at a subsequent time.;

after which he goes on to say at p. 285 that:

If, on the other hand, the majority in the *Mansfield* case would require that a company establish not only a loss of revenue to offset the expenses thrown away in a work stoppage, but also that it did not make up such loss of revenue by the end of the fiscal period, then I respectfully disagree with the majority and to the extent that Mr. Weiler concurs in that view in his award, must with deference disagree with him also.

and again at page 286:

In these cases [referring to earlier jurisprudence], entitlement to damages is not predicated upon the expiry of a fiscal period as it is in the *Mansfield* decision, *supra*. And why should the end of a fiscal period of an employer be the all important date for determination? It is true that production at the work place is not the same every day.

The essence of arbitrator Williams' reasoning has been applied to the facts which were before this Board in the case at hand. In the Board's view, that reasoning is equally suited to a case like this where the costs are of such a discrete nature.

CONCLUSION

38. Having regard for all of the foregoing, the Board is satisfied that, with respect to both the facts on which damages were assessed against Local 786 because of its liability for the unlawful strike against Moore and Dominion and the relevant law applied to those facts, damages were correctly awarded against Local 786 and in favour of Moore and Dominion. The parties had a full and fair hearing and the request for reconsideration is lacking of any new evidence which, with due diligence, could not have been obtained previously or of any request to make representations not already considered by the Board. Nor does the request raise any other grounds which would cause the Board to reconsider, vary or revoke its decision.

39. In the result, the Board is of the opinion that it should not reconsider, vary or revoke its decision which issued in these matters on April 21, 1983. The request of the respondent International Association of Bridge, Structural and Ornamental Ironworkers Local 786 is denied, therefore.

1516-83-R Ken Price, on his own behalf and on behalf of a Group of Employees, Applicant, v. Shopmen's Local Union No. 834 of the International Association of Bridge Structural and Ornamental Iron Workers, Respondent, v. **Empco-Fab Ltd.** Intervener.

Practice and Procedure – Termination – Petition rejected by Board because employer paid lawyer's fees of earlier petition by same employee to knowledge of employees – Present termination petition by different employee group – Lawyer in question not involved in petition – Petition accepted in circumstances

BEFORE: Owen V. Gray, Vice-Chairman and Board Members J. Wilson and C. A. Balentine.

APPEARANCES: *E. Rovet and K. Prince for the applicant; Roy B. Sim for the respondent; no one appeared for the intervener.*

DECISION OF THE BOARD; November 2, 1983

1. This is an application under section 57(2) of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent trade union.

2. The application is timely. It is supported by a statement of desire signed by 12 persons. The employer has filed a list of the employees in the bargaining unit. Eleven of the 12 names on the employer's list correspond with names of persons whose signatures appear on the statement of the desire. Thus, not less than forty-five per cent of the employees in the bargaining unit have signified in writing that they no longer wish to be represented by the trade union. Pursuant to subsection (3) of section 57, however, we are obliged to consider whether these significations are voluntary.

3. The applicant testified with respect to the origination and circulation of the petition he filed with the Board. We are satisfied from his evidence that there was no management involvement in the origination or circulation of the petition.

4. The respondent trade union called no witnesses. Nevertheless, its representative asked the Board to find that the petition presented by the applicant is not a voluntary one. He asked us to take into account the labour relations history of the intervener employer as set out in a decision of this Board, differently constituted, dated August 17, 1982 and reported

at [1982] OLRB Rep. Aug. 1162. That decision dealt with an earlier application for termination of bargaining rights of the respondent for the same bargaining unit affected by this application. The applicant was one Joseph Appleman. Appleman had been the sponsor of two previous petitions. In 1980 Mr. Appleman had sponsored a petition against the United Steelworkers of America at the time it attempted to certify this bargaining unit, and had retained a lawyer, Michael Gordon, to represent the petitioners. The petition was accepted by the Board as voluntary. Accordingly, the Board exercised its discretion and ordered a vote. The Steelworkers lost the vote.

5. On the basis of the evidence of certain witnesses and inferences drawn from the failure to call others, the Board in the decision of August 17, 1982 concluded that Michael Gordon's bill to Appleman for services in connection with the 1980 petition was paid by the employer, and that this fact had become known to an indeterminate number of employees still in the bargaining unit as of the date of Appleman's 1982 termination petition. The Board noted that Appleman had also sponsored a petition in 1981 at the time of the respondent's certification application. It concluded that Mr. Appleman's failure to obtain any signatures on that petition was perhaps connected with the fact that he had not again retained Mr. Gordon. The petition then before the Board indicated on its face that Mr. Gordon would be representing the petitioners, and the Board concluded that employees who knew of Mr. Gordon's previous payment by the employer might have signed the petition that a failure to sign would come to the knowledge of the employer.

6. Mr. Appleman is not the applicant in this case. The applicant admitted being aware of the petition discussed in the Board's decision of August 17, 1982, and said he had signed it. After signing it, he had left the employ of the intervener before termination application for which it had been prepared came before the Board for hearing. When he returned to the employ of the intervener in April or May of 1983, the applicant was surprised to learn that the petition had been unsuccessful. Asked whether he was aware that the dismissal was due to a "legal counsel problem" the applicant said that in his discussions with his fellow employees nothing had been firm about why the petition had been rejected by the Board. All he knew was that two employees who had not signed the petition had "put up a squawk".

7. The thrust of the Board's 1982 decision was that a petition which involved Michael Gordon appeared likely, on the evidence then before the Board, to have a coercive effect on employees. It seems implicit in the Board's conclusions that the employer's payment of Mr. Gordon in 1980 did not have a general coercive effect on petitions, such as the one prepared by Appleman in 1981, which were not associated with Mr. Gordon. There is no evidence that the petition before us is in any way associated with Mr. Gordon.

8. The existence of past employer unfair practices cannot forever block the statutory right of employees to present timely applications for termination of bargaining rights: *J.A.K. Electrical Contractors Ltd.*, [1977] OLRB Rep. May 275.

9. Quite apart from their limited value on the facts of this particular case, there may be some doubt whether inferences drawn from the state of evidence before the Board in a previous case may be asserted against the interest of a freshly constituted group of employees represented by a different applicant. Even if we take the Board's previous decision into account, however, we are find that the statement of desire before us satisfies the requirements of subsection 57(3) of the *Labour Relations Act*.

10. The Board directs that a representation vote be taken of the employees of Empco-Fab Ltd. Those eligible to vote are all employees of Empco-Fab Ltd. at Whitby, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, draftsmen, watchmen, guards and persons engaged in field fabrication work on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

11. Voters will be asked whether or not they wish to be represented by the respondent union in their employment relations with Empco-Fab Ltd.

12. The Board hereby appoints a labour relations officer to confer with the parties with respect to the arrangements for and the conduct of the vote.

13. The matter is referred to the Registrar.

1381-83-R International Union of Bricklayers and Allied Craftsmen, Local 2, Applicant, v. **The Corporation of the City of Etobicoke**, Respondent, v. The Canadian Union of Public Employees, Intervener

Certification – Evidence – Practice and Procedure – Subsisting CUPE agreement not covering bricklayers construction work – No extrinsic evidence permissible to establish scope of agreement in absence of patent or latent ambiguity – Agreement not bar to Bricklayers’ construction industry application

BEFORE: R. A. Furness, Vice-Chairman, and Board Members R. Redford and W. F. Ruth-erford.

APPEARANCES: *B. Fishbein, J. Robbins, J. Elliott and L. Steinberg for the applicant; M. Patrick Moran, George Metcalfe and Martin Birmingham for the respondent; Helen O'Regan, Rex Herrington and Michael Harper for the intervener.*

DECISION OF THE BOARD; November 8, 1983

1. The applicant is applying for certification with respect to a bargaining unit defined as “all journeymen and apprentice bricklayers and stonemasons in the employ of the respondent: (i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and (ii) in all other sectors of the construction industry, save and except for the industrial, commercial and institutional sector, in O.L.R.B. geographic area No. 8”.

2. The respondent and the Borough of Etobicoke Civic Employees’ Local Union No. 185 (“Local 185”) are parties to a collective agreement. It is the position of the respondent that this collective agreement is a bar to this application for certification. The applicant and the intervener agree that this collective agreement is not a bar to this application and propose a clarity note to the bargaining unit described in paragraph one which states “that persons

engaged in maintenance work, including maintenance work involving brick, stone and plaster, presently and in the future, performed by persons covered by the intervener's collective agreement are not included in the bargaining unit''.

3. There is no dispute that the respondent employed three bricklayers on September 22, 1983, the date of the filing of this application, and that these three bricklayers have been performing the work of bricklayers for the majority of their time. The initial consideration before the Board is the application and coverage of the collective agreement.

4. The respondent adopted the position that it was entitled to call evidence that Local 185 and the respondent agreed that the collective agreement covered the employees who are affected by this application. It was the position of the respondent that up to the date of hearing on October 21, 1983, the respondent and Local 185 had agreed that the employees affected by this application and similar employees had been covered by the collective agreement. The respondent argued that the collective agreement described the bargaining unit as an all-employee unit on the active payroll and does not describe work in terms of construction and non-construction. The respondent further argued that the collective agreement included some classifications in construction. It was the position of the respondent that it ought to have the opportunity to call extrinsic evidence. While the respondent conceded that there was no patent ambiguity, there was, in the view of the respondent, a latent ambiguity which would show that the collective agreement was intended to cover all employees whether construction or non-construction employees.

5. The applicant and the intervener opposed the request of the respondent to call extrinsic evidence and viewed this request as an attempt to expand the language of the collective agreement.

6. Articles 2.01 and 2.05 provide as follows:

Article 2 RECOGNITION

2.01 The Employer agrees to recognize THE BOROUGH OF ETOBICOKE CIVIC EMPLOYEES' LOCAL UNION NO. 185, chartered with the CANADIAN UNION OF PUBLIC EMPLOYEES, and affiliated with THE CANADIAN LABOUR CONGRESS, as the exclusive bargaining agency for the employees of the Corporation of the Borough of Etobicoke with respect to rates of pay, hours of work and other working conditions of such employees. The term "employee" or "employees" used throughout this agreement shall be interpreted to mean:

(a) every employee on the active payroll of the Employer in the Construction Inspection Section, Sanitation Section, Roads Section, Utilities Section, and Sign Shop Section of the Works Department, Stores Section of the Finance Department, Municipal Properties Department and Parks Section of the Parks and Recreation Services Department, save and except those above the rank of working foreman, salaried personnel and employees covered by subsisting collective agreements with the Employer, and

(b) every employee on the active payroll of the Employer in the Survey Section of the Works Department save and except Assistant Section Heads, persons above the rank of Assistant Section Head, Office Staff and employees covered by subsisting collective agreements with the Employer, and

(c) all employees on the active payroll of the Employer in the Recreation Section of the Parks and Recreation Services Department save and except Recreation Assistants, Assistant Arena Managers, Assistant Stadium Managers, Assistant Managers Facility, Community Centre Assistants and persons above the rank of Recreation Assistant, Assistant Arena Manager, Assistant Stadium Manager, Assistant Manager Facility, Community Centre Assistant, office staff, students employed during the school vacation periods and persons regularly employed for not more than twenty-four (24) hours per week.

It is agreed by both parties that those persons excluded by the Ontario Labour Relations Board for purposes of clarity in its decision of December 8, 1970, are not included in the Bargaining Unit.

*** Articles marked with three (3) asterisks (***) do not apply to employees as defined in Article 2.01(c).

(d) All employees on the active payroll of the Employer employed in the Etobicoke Olympium save and except Aquatics Assistants, Gymnastic [sic] Assistants, Assistant Building Superintendents, Assistant Food Services Manager and persons occupying equivalent positions and persons above the rank of Aquatics Assistant, Gymnastic Assistant, Assistant Building Superintendent, Assistant Food Services Manager and persons occupying equivalent positions and the Administrative Office Staff, Students employed during the school vacation periods and persons regularly employed for not more than twenty-four (24) hours per week.

(e) Every employee on the active payroll of the Employer in the Radio Control Section of the Utilities Division of the Works Department classified as Radio Control Clerks, Clerk of Works 7 and Senior Clerk.

(f) Every employee on the active payroll of the Employer classified as Animal Patrol Officer in the Animal Control Section of the Clerk's Department.

2.05 Definition of "on the active payroll":

A permanent employee will be on the active payroll while he is receiving wages, vacation or holiday pay, sick pay. Benefits will be maintained for all permanent employees on the active payroll.

A permanent employee absent through illness or non-compensable injury will have all benefits maintained while he is in receipt of sick pay subject to Articles 6.02(a) and 11.02(c).

A permanent employee absent through illness or non-compensable injury whose sick leave credits expire before a period of six (6) consecutive months absence has elapsed will have all of his benefits, except pension, maintained by the Borough for the balance of the six (6) months period subject to Article 6.02(a). A permanent employee in receipt of L.T.D. payments will have all benefits except Life Insurance suspended.

A permanent employee absent through illness or injury will have his job held open for the period of his absence, subject to a maximum of twelve (12) consecutive months. For a further twelve (12) months the Employer will make every effort to place that employee in a position that may become vacant provided that such employee has the necessary qualifications for such a position and is medically certified as being physically and mentally fit for the position.

Upon being eligible for L.T.D. payments an employee will be entered into a holding unit for a period of eighteen (18) months. If during that period the employee has recovered sufficiently to become available for work, the Employer will make every effort to place that employee in a position that may have become vacant provided that such employee has the necessary qualifications for such a position and is medically certified as being physically and mentally fit for the position.

In this context "benefits" means Life Insurance, L.T.D.I., O.H.I.P., E.H.C., Sick Leave Accumulation, Dental, Pension, Vacation. However, notwithstanding the definition of benefits given above, Vacations will cease to accrue at the end of a six (6) months period of absence, or the expiry of sick leave, whichever is the earlier.

7. Article 2.01 provides that the term "employee" or "employees" used throughout the collective agreement shall be interpreted to mean employees on the active payroll. Article 2.05 defines "on the active payroll" in terms of permanent employees. There is no dispute that the three bricklayers affected by this application are being employed by the respondent under the Canada-Ontario Employment Incentive Programme for periods up to but not exceeding one hundred and twenty days and are not permanent employees. The collective agreement resembles an industrial or non-construction industry collective agreement and appears to have its origin in a non-construction certificate issued by the Board on December 8, 1970. There is nothing in the collective agreement which suggests an expansion of bargaining rights to cover construction employees. There is no mention of craft jurisdiction, no reference to a hiring hall and no specific classification for bricklayers in the collective agreement. The only reference to construction is with respect to "the Construction Inspection Section" in article 2.01(a).

8. The classifications in the collective agreement are to be read with the recognition clause in article 2.01 and clearly do not relate to construction work performed by bricklayers.

While the bricklayers may have been assigned a rate ostensibly under article 12.01 of the collective agreement, any negotiated rate under that article only refers to a classification within the bargaining unit. Bricklayers performing construction work are not included in the bargaining unit. The payment of an employee of a rate under a collective agreement and the payment of dues do not in themselves mean that such an employee is covered by that collective agreement. (See *Ecodyne Limited*, [1979] OLRB Rep. July 629.)

9. The Board is not prepared to find that there is an ambiguity, either patent or latent in the terms of the collective agreement, which would cause the Board to permit the respondent to call extrinsic evidence.

10. The respondent requested clarification of the above decision of the Board and requested permission to call evidence with respect to its alleged negotiations with the intervener regarding the exclusion or inclusion of bricklayers from the collective agreement between the respondent and the intervener. The evidence which the respondent proposes to adduce before the Board is, in our opinion, extrinsic evidence which would purport to vary the written terms of a collective agreement. Section 1(1)(e) of the *Labour Relations Act* provides that a collective agreement is an agreement in writing. The Board is not prepared to permit the respondent to adduce the extrinsic evidence it has referred to in argument.

• • • •

[Balance of decision finding union status, bargaining unit, membership evidence etc. and issuing certificate omitted]

1131-83-R United Steelworkers of America, Applicant, v. **Ferrum Metal Mfg. Co.**, a Division of Elite Blouse and Skirt Company Limited, Respondent, v. Group of Employees, Objectors

Certification – Petition – Practice and Procedure – Objector distributing blank petitions and receiving them back signed several days later – Whether Board accepting these as voluntary – Threats of plant closure and discharge and actual discharge making voluntary representation vote impossible – Board not directing vote despite overlapping voluntary petition – Board distinguishing *Baltimore Aircoil* policy

BEFORE: D. E. Franks, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

APPEARANCES: Brian Shell and Winston Curtis for the applicant; R. J. McComb and Marvin Besunder for the respondent; Mira Dragicevic, Slavica Seperac, Houane Thao and Som Sy Amphone for the group of employees.

DECISION OF VICE-CHAIRMAN, D. E. FRANKS AND BOARD MEMBER C. A. BALLENTINE; November 4, 1983

1. The name of the respondent is amended to read: "Ferrum Metal Mfg. Co., a Division of Elite Blouse and Skirt Company Limited".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four hours (24 hrs.) per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. For the purposes of clarity, the Board notes that this bargaining unit applies only to the employees of the respondent employed at 48 Apex Road, Toronto, and any other location at which the respondent may relocate any part of its present production facilities within the Municipality of Metropolitan Toronto.
6. There was filed with this application a series of eight typewritten documents in the following form:

"RE: FERRUM METAL CO.
48 APEX RD.
TORONTO

AND: UNION CERTIFICATION APPLICATION BY UNITED STEEL-
WORKERS OF AMERICA

I, (name deleted), an employee of Ferrum Metal Co., filled out a Union Membership Card in August 1983, however I have since changed my mind.

I no longer wish to join the United Steelworkers [sic] Union because I did not really understand how it worked.

I make this statement voluntarily and without threat from any party.

signed _____ (signature) _____

date _____ (dated)''

At the hearing in this matter, the Board heard the evidence concerning the origination, preparation and circulation of these documents. The documents were the result of Ms. Mira Dragicevic's opposition to the applicant trade union. She is an employee on d indeed, with respect to four of the documents she gave those documents to someone else who in turn circulated thoffice of a lawyer, Mr. Michael Birman, whom she contacted about opposing this application. Apparently, an original was typed and Ms. Dragicevic made a dozen copies.

7. The pattern concerning the signing of these documents is that Ms. Dragicevic gave the sheet to various employees who wanted to oppose the union and received them back from them at some later time. In this regard, she did not witness any of the signatures on the document, and indeed, with respect to four of the documents she gave those documents to someone else who in turn circulated them. She received them back from that person several days later. In such circumstances, the Board would be reluctant to accept these documents as evidencing the voluntary wishes of the employees. However, with respect to two of the documents the Board heard specific evidence from the person who signed the document concerning her signature on the document, and the signature on another document by her husband. Her evidence is that she had been given the documents by Ms. Dragicevic on the way to the bus stop after work and that she took them home and both she and her husband signed them, and then subsequently, returned them to Ms. Dragicevic who ultimately took them in to the Labour Relations Board.

8. In the course of its inquiry into the events surrounding the circulation of the documents filed in opposition to the application, the Board also heard evidence tendered by the applicant trade union concerning the circulation of these documents. The first witness was Krishna Kam Bisal who has been employed as a welder for seven months by the respondent employer. His evidence is that a person named Kahlon whom he perceived to be a foreman (however, he is an employee on the list of employees) came to him on about August 29th and asked him to sign against the union. Bisal asked Kahlon why he had come to him and Kahlon replied that we are "all Indians together (East Indians)." The next day Kahlon again asked Bisal to sign against the union. Further, on the following day, Kahlon and Mira Dragicevic, the originator of the petition, approached Bisal. Bisal's evidence is that Mira Dragicevic had a long list of names with her, and that Mira said "If you don't sign against the

union you are a helper and the raise in pay you received will be taken back''. Bisal's evidence was that he had recently received a raise from \$6.00 per hour to \$7.00 per hour.

9. Mr. Bisal was also approached by a person he referred to as Danny, another foreman in a different department from his. Bisal's evidence is that this person told him that "Slava wants to see you", a reference to Slava Seperac who assisted Mira Dragicevic in the circulation of the statements of desire. Slavica Seperac appeared at the hearing, however, during the hearing she requested to leave and, indeed, left without giving any evidence. Bisal's evidence is that he went to see Slava at her work section. Bisal's evidence was that Slava asked him why he wouldn't sign against the union and told him that if the union gets in the company would close down.

10. The other witness called by the applicant was a Mr. Kurlan Edwards. He was hired by the company on August 26th and apparently fired on September 1st. His evidence is that Slava Seperac, whom he also identified as a forelady, on August 30th came to him and asked him to sign a blank piece of paper for the company's side. Mr. Edwards refused to sign it and the next day Slava returned and told him that if he didn't sign he would be fired. At this point his evidence is that she walked over and talked to a person described as being tall and skinny with glasses. Edwards said that he believed the person's name was Roy Lock. It was Edwards' evidence that this Mr. Lock, the person who hired him, approached him on September 1st, told him his work was not satisfactory and terminated his employment.

11. Put at its highest, the evidence tendered by the group of objecting employees only relates to the voluntariness of two of the documents filed in opposition to the application. This, however, is significant since these two documents, overlap sufficiently with the evidence filed by the applicant to ordinarily cause the Board to doubt whether the Union has the continued support of more than fifty-five per cent of the employees in the bargaining unit and the Board normally exercises its discretion to order a vote to resolve that doubt. The question that arises, however, is the present circumstances, what effect should be given to such documents. The effect of documents filed by employees objecting to a trade union's application for certification was canvassed in great detail by this Board in the case of *Baltimore Aircoil Interamerican Corporation* [1982] OLRB Rep. Oct. 1387. At page 1404 the Board summarized its view of such documents:

"However, even where the Board is satisfied that more than 55% of the employees in the bargaining unit are members of an applicant trade union the Board may direct that a representation vote be taken pursuant to section 7(2). It is in the exercise of this discretion that the Board considers 'evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union', filed with the Board in compliance with Rule 73 of the Board's Rules of Procedure. Stated another way, evidence of objection by employees to certification or of signification by employees that they no longer wish to be represented by a trade union is not, having regard to the scheme of the Act, evidence relating to membership in a trade union for the purposes of an application for certification and for this reason a statement of desire, no matter what the actual wording, does not cancel out or revoke membership evidence submitted by an applicant trade union in the form prescribed by section 1(1)(1) of the *Labour Relations*

Act. See Caldwell Linen Mills Limited, [1967] OLRB Rep. March 948 at paragraph 10; *Diebold Company of Canada Limited*, [1976] OLRB Rep. May 237 at paragraph 10; and *Re Royal Canadian Yacht Club and Hotel, Restaurant and Cafeteria Employees' Union, Local 75 et al.*, (1981), 129 D.L.R. (3d) 554 at 558. Rather, relevant "overlapping" evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union, filed not later than the terminal date for the application, and where accepted by the Board as a voluntary expression of the wishes of the employee signatories, will generally cast a doubt on the evidence of membership filed by the an applicant (to use the words of the explanatory note found in Form 6) such as to cause the Board to exercise its discretion under section 7(2) and direct the taking of a representation vote. It would be somewhat anomalous if evidence of membership, which must withstand the requirements laid down in the Act together with its related rules and forms, could be "revoked" by a much less formal and essentially unregulated course of conduct which usually follows on the heels of an employee having joined a trade union. By making a representation vote the maximum effect of an opposing petition the legislation both accomodates the resiling nature of petition evidence and recognizes that trade union organizing campaigns often require considerable investment of time and monies. Once an employee has signed a membership application form and submitted to the cautionary test of the payment of \$1.00, a trade union is entitled to rely on that commitment for the purposes of an application for certification to the extent that it is assured its application will not be dismissed on the basis of insufficient threshold membership support (i.e. 45 percent) by the mere filing of a "second thoughts" prior to the terminal date. If this was not the approach taken, a trade union would never know when to cease organizing. It is this relationship between membership and petition evidence which constitutes part of the policy behind permitting this Board to direct a representation vote even when the trade union files membership evidence on behalf of more than 55 per cent in the bargaining unit. It is also the reason why the statute distinguishes between an application date and a terminal date."

(emphasis added)

In the present case the applicant filed evidence of membership indicating more than fifty-five per cent support in the trade union. As noted above, there is an overlap of two individual documents casting a doubt as to whether two of the employees who signed membership documents continue to support the applicant. However, the Board has heard evidence that during the campaign to obtain signatures against the trade union there were threats of plant closings, termination of employment, and indeed, the actual termination of Mr. Edwards. We are of the view that such a series of events have created an atmosphere in the workplace in which a vote is not likely to represent the true wishes of the employees. In making this finding, it is important to note that we are not making specific findings of violations of the Act on the part of either those who circulated the documents in opposition or on the part of the employer. Rather, we are simply finding that the workplace has been upset in such a manner that a vote will now not disclose the true wishes of the employees.

12. Referring back to the Board's policy as enunciated in *Baltimore Aircoil Interamerican Corporation, supra* we find ourselves in the position that, in the circumstance of this case, we cannot give effect to that policy. That is, although a voluntary petition that has sufficient overlap with this membership evidence filed by the union generally causes the Board to direct a vote, since we are satisfied that the results of a vote in the circumstances of this case would not assist us, we do not think it is appropriate for us to exercise our discretion to order a vote, and therefore, we simply rely on the membership evidence as filed by the applicant.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 6, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER F. W. MURRAY;

1. I dissent.

2. I would have accepted the evidence given by the employee who testified that she, together with her husband, signed the petition at home and returned it to Mrs. Dragicevic.

3. I would also further observe that all of the threats expressed were those made by employees who were clearly in the bargaining unit, and it is not unusual during a unionizing campaign to hear that employees are expressing dire threats of terrible events to happen should employees join or not join a trade union.

4. I would not have found that the workplace was that upset so as to cause the Board to change from its usual policy of ordering a vote where the clear majority of cards not in doubt has been reduced to under fifty-five per cent.

5. Accordingly, I would have ordered the taking of a secret ballot vote.

1534-83-M International Association of Machinists and Aerospace Workers Riverside Lodge No. 939, Applicant, v. **Fleet Industries**, A Division of Ronyx Corporation Limited, Respondent

Employee – Employee Reference – Parties failing to resolve dispute as to employee status at negotiations – Union reserving right to pursue matter – Fact that party attempting to alter established status quo not bar to reference under s.106(2) – but clear evidence required to establish need for change – Board determination as to employee status not resolving question of inclusion in unit

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

DECISION OF THE BOARD; November 28, 1983

1. This is a request made pursuant to section 106(2) of the *Labour Relations Act* for a Board determination of the employee status under the Act of a number of individuals, more particularly identified and listed in the applicant union's submission received by the Board on October 5, 1983. That submission was circulated to the respondent employer which, by its counsel, submits that the Board should not entertain the union's request. Section 106(2) reads as follows:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

Certain provisions appearing in the parties' current collective agreement may also be relevant:

2.02 The employees covered by this Agreement shall be all office and clerical employees of the Company save and except persons at present represented by Frontier Lodge 171 of the International Association of Machinists and Aerospace Workers for collective bargaining purposes, Supervisors, Assistant Foremen and persons above that rank. Personnel Division staff, Registered Professional Engineers and certain persons mutually agreeable to the Company and Union as occupying positions which are deemed to give them access to material of a confidential nature. Such positions are listed in Appendix B hereto.

APPENDIX "B"

The following positions are considered to be of a confidential nature, and therefore, employees occupying these positions are declared to be ineligible for participation in this Collective Agreement.

The Union will be supplied the names of people occupying positions noted in Appendix "B" together with a summary of their respective duties, and such list will be kept up to date at all times.

Secretaries of Officers of the Company and Department Heads
 All Contract Administrators, Salesmen and Trainees
 The Senior Payroll Clerk (until replaced)
 The Chief Ledger Posting Clerk (until replaced)
 The Senior Contract Estimator (until replaced)
 The Chief Cost Analysis Clerk (until replaced)
 Project Engineers.

2. In order to preserve the arm's length relationship between labour and management necessary for orderly collective bargaining, section 1(3)(b) of the Act excludes from its ambit persons who, *in the opinion of the Board*, exercise managerial functions or are employed in a confidential capacity in matters respecting labour relations. These individuals – clearly "employees" at common law – are deemed not to be "employees" for industrial relations purposes. However, it is not always easy to determine where the line should be drawn; moreover, organizational change, the evolution of job functions, or the creation of new job classifications may raise questions between the parties as to the precise parameters of the bargaining unit. When such questions arise and cannot be resolved by the parties themselves, section 106(2) provides a mechanism for reference to this Board for a binding interpretation.

3. There is no doubt that there is currently a question between the parties as to the status of certain individuals which could not be resolved at the parties' most recent round of collective bargaining negotiations. According to the employer's submission, when the impasse occurred, the union "indicated that it would pursue other remedies". It is clear that the union was not conceding its position and was reserving its right to take such steps as may be necessary to clarify the situation. The circumstances fit squarely within the terms of section 106(2) and we see no reason why we should refuse to entertain the union's request.

4. We should point out, however, that there is considerable force to the employer's submission that the union is seeking to alter a well-established status quo and that even if the disputed individuals are "employees" within the meaning of the Act, they are not necessarily "employees" in the bargaining unit. The relationship between employee status under the Act (determined by this Board) and the composition of the bargaining unit (ultimately determined by an arbitrator) was discussed at some length in *Northern Telecom*, [1983] OLRB Rep. Jan. 954:

4. A collective agreement has no common law foundation. Its legal characteristics are drawn from the Act, and by definition (see section 1(1)(e)), it prescribes the terms and conditions of "employment" for "employees" represented by the union which, in turn, is an "organization of employees". Moreover, (see section 50) it is only binding upon "the employees in the bargaining unit" defined in it. In both cases, the term "employee" must be taken to exclude persons who by virtue of section 1(3)(b) are not "employees" under the Act. Indeed, given the array of provisions designed to ensure the separation of employer and employees (see sections 1(3)(b), 13, 48, 64 and 106) it would be anomalous if management

were in the bargaining unit or covered by the collective agreement. It follows that if an individual exercises managerial functions he is not an "employee" under the Act, and cannot be considered an "employee" for collective bargaining purposes, or to whom the negotiated collective agreement applies. Finally, since employee status under the Act turns on the opinion of the Ontario Labour Relations Board, it is doubtful whether an arbitrator under a collective agreement has any jurisdiction to resolve this issue. It is the opinion of this Board in the exercise of its exclusive jurisdiction which is determinative.

5. For the foregoing reasons, a Board determination that an individual exercises managerial functions and is not an "employee" under the Act may well be determinative of his status under a collective agreement. If, in the opinion of the Board, he exercises managerial functions, then he is not an employee, and the agreement cannot apply. On the other hand, if, in the opinion of the Board, he does *not* exercise managerial functions then he is an employee under the Act to whom the agreement *may* apply depending on its terms. But it does not necessarily follow that "all employees" will be covered by an outstanding collective agreement. That depends upon the bargaining unit description which the parties have negotiated. It is not at all unusual for certain employee categories to be excluded from a collective agreement. These employees are not covered by the agreement even though they are legally eligible for coverage. Likewise, it is not unusual for disputes to arise between the parties about the application of the agreement to individuals who are clearly employees, but who may nevertheless be beyond the scope of the agreement because the contractual language is not broad enough to cover their job classifications. These are questions which must ultimately be resolved by arbitration, since they involve the interpretation of the collective agreement. Of course, if the dispute centres on a term such as "foreman", "supervisor", or other word intended by the parties to denote managerial status, then the Board decision will probably resolve the interpretation problem and make a resort to arbitration unnecessary. It is unlikely that the parties intended such terms to include persons who are not really "managerial" under the Act.

6. To summarize then:

- (a) If the issue between the parties involves the status of an employee under the Act, then the Board has exclusive jurisdiction to determine that issue.
- (b) The fact that an individual is an employee under the *Labour Relations Act* does not necessarily mean that he falls within the negotiated scope of any particular collective agreement.
- (c) If an individual is admitted to be an employee under the Act then his inclusion in a negotiated bargaining unit is for an arbitrator to determine.

- (d) Where the parties' dispute involves language denoting managerial status, the Board's decision with respect to who is "management" for the purposes of collective bargaining under the Act, will likely be sufficient to resolve the dispute.

Thus, if this Board concludes that the subject individuals are "employees" within the meaning of the Act, it may be up to an arbitrator to determine whether, when the parties drafted the exclusion portion of the recognition clause, they were intending to define or clarify those individuals or categories to whom section 1(3)(b) would apply. This would be the usual inference from such general words as "foreman" or "supervisor"; however, as will be seen, the collective agreement here is framed more broadly.

5. With respect to the assertion that the union is attempting to alter an established status quo, we might only point out that an agreement on the bargaining unit configuration does not freeze the perimeter of the bargaining unit in perpetuity. On the contrary, section 106(2) itself envisages that questions may arise from time to time and provides a means for their resolution. The fact that one party or another is seeking to change the status quo does not constitute a bar to a section 106(2) determination. What it does do is provide additional *evidence* which the Board may consider relevant in reaching its decision. A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years, must recognize the importance of this historical dimension and may have to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect. And in close cases this historical dimension may well be determinative.

6. Having regard to the foregoing, the Board hereby appoints a Board Officer to inquire into and report to the Board on the duties and responsibilities of the individuals more particularly identified in the union's application. The parties' attention is directed to both Practice Note 4 and the general principles enunciated in *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121. The parties might also consider such decisions of the Board as *Inglis Limited*, [1976] OLRB Rep. June 270 and *Storwall International Inc.*, [1981] OLRB Rep. March 366, which may be of some assistance to them in narrowing the issues or framing their submissions.

**1366-83-R Labourers' International Union of North America, Local 837, Applicant,
v. Freure Homes Limited, Respondent**

Bargaining Unit – Construction Industry – Practice and Procedure – Board practice in construction industry not to distinguish between regular employees and part-time or temporary employees – Board refusing to exclude “casual” employees from unit

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members A. Grant and L. C. Collins.

APPEARANCES: *B. Fishbein and J. Vella for the applicant; Marc Somerville, Q.C. and David Freure for the respondent.*

DECISION OF THE BOARD; November 8, 1983

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The Board finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*. The Board further finds that the application does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the Act.
4. The applicant seeks to be certified to represent all unrepresented trades in the employ of the respondent in Board Area #5 as of the application date. We are satisfied, pursuant to section 6(1) of the Act, that such a unit would be appropriate for collective bargaining. The parties are now in agreement that on the application date the respondent had in its employ in Board Area #5 construction labourers, carpenters and rodmen. The Board would note that by letter dated November 3, 1983, the applicant withdrew its contention that the respondent also employed a number of cement masons.
5. At the hearing, the respondent requested that employees who are regularly employed by the respondent outside Board Area #5, but who work in the area on a “casual basis” be excluded from the bargaining unit. Due to the particular nature of the industry, when dealing with construction industry certification applications the Board’s long standing practice has not been to distinguish between persons employed on a part-time or temporary basis from those employed on a more regular basis. See *Moyer Construction Co. Ltd.* [1969] OLRB Rep. Oct. 914. In our view, the facts of this case are not such as to warrant a departure from this practice. Accordingly, persons employed by the respondent on a casual basis in the Board area will not be excluded from the bargaining unit.
6. Having regard to the above, the Board finds that all carpenters, carpenters’ apprentices, construction labourers and rodmen in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and

institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. Having regard to all of the material before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 29, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will issue to the applicant.

**1049-83-R International Association of Machinists and Aerospace Workers, Applicant,
v. G & B Automated Equipment Ltd., Respondent**

Bargaining Unit – Evidence – Natural Justice – Practice and Procedure – Reconsideration – Board's usual practice to use application date as cut-off date for evidence of community of interest upheld in oral ruling – No breach of natural justice – Board reviewing policy as to future events – Reconsidering earlier ruling in view of unique circumstances – Permitting evidence of increased work in plant by employees of Engineering Dept. planned for future by decision finalized prior to application date

BEFORE: R. D. Howe, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER I. M. STAMP; November 4, 1983

1. This is an application for certification in which the Board, differently constituted, appointed a Board Officer on September 6, 1983 to inquire into and report to the Board on the community of interest, if any, which employees in the respondent's engineering department have with the other employees in the bargaining unit proposed by the applicant.

2. The applicant seeks bargaining rights for a standard production unit consisting of all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff. The applicant is of the view that the employees in the respondent's engineering department do not share a community of interest with (non-engineering) production employees and, therefore, should not be included in the bargaining unit. The respondent, on the other hand, submits that it would be artificial and undesirable to exclude engineering department personnel from the bargaining unit since they allegedly spend a significant amount of their time working side by side with production employees in the manufacture of the sophisticated computer aided equipment which the respondent produces for use by companies in the abrasive manufacturing industry. In particular,

the respondent contends that in addition to development and designing work which is performed in the engineering department, personnel from that department also build, install, start up and debug the product on the plant floor. Accordingly, the respondent submits that there is a strong functional coherence and interdependence between the production employees and the employees in the engineering department, which should prompt the Board to join the two groups of employees in a single bargaining unit.

3. Early in the proceedings before the Board Officer appointed to conduct the aforementioned inquiry, an issue arose between the parties concerning the scope of the evidence admissible before the Officer. It was the applicant's position that, in conformity with the Board's usual practice in such matters, evidence concerning community of interest should be confined to circumstances that existed on (or within a reasonable period before) the date of the application. The respondent, on the other hand, submitted that the Board should depart from that practice in the circumstances of the present case. After hearing and considering the submissions of the parties concerning that issue on September 27, 1983, the Board, in an effort to avoid any unnecessary delay in processing this application, gave a brief oral ruling in which it declined to depart from its usual practice by which the date of the application is the cut-off date for evidence pertaining to community of interest.

4. By letter dated October 14, 1983, counsel for the respondent requested the Board to reconsider that ruling. In that letter, counsel reiterated and amplified some of his submissions in support of the position which he advocated on September 27, 1983. A copy of his letter was forwarded to the applicant and its counsel for their comments. In a brief letter dated October 19, 1983, which was received by the Board on October 28, 1983, counsel for the applicant submitted that there are no grounds upon which the Board should reconsider the ruling in question.

5. The facts stipulated by counsel for the respondent in support of his position (and assumed by the Board to be true for the purposes of this decision) are as follows. The respondent is heavily engaged in the development of computer aided machinery used by companies which manufacture abrasives. In recent years each piece of computer aided machinery produced by the respondent has tended to represent the "state of the art" in the industry. At the present time there is only one piece of machinery being built in the respondent's plant. That machine had been under construction for approximately one year prior to the union's certification application, which was filed with the Board on August 16, 1983. Although engineering department personnel had performed some work on that machine in the plant prior to the application, their involvement had been relatively limited. However, the machine will not be completed until some time in 1985 and engineering department personnel will become increasingly involved in working on it in the plant as its computer and electronic components are installed and debugged. Of the approximately 65,000 man hours of "shop work" involved in producing that piece of machinery, approximately 15,000 to 20,000 man hours are to be performed on the shop floor by engineering department personnel. Most of those hours have been scheduled to be performed after the date of this application. However, the respondent's plans and commitments for such engineering shop work had been finalized prior to the date of the application. Thus, in 1984, the respondent anticipates that the amount of work to be performed on that machine on the plant floor by its (non-engineering) production workers will substantially decrease, while the plant floor work to be performed on it by the respondent's engineering personnel will substantially increase. Although the respondent's plant has been in operation for about twenty years, in recent years a "strategic decision" by the respondent to

concentrate its efforts on the development and manufacture of computer aided machinery has resulted in an increasing amount of work being performed on the plant floor by engineering department personnel, with each piece of equipment built by the respondent tending to be more sophisticated than the preceding one. Management is actively seeking further orders for such machinery.

6. In his request for reconsideration, counsel for the respondent submits that evidence as to the engineering shop work to be performed on the aforementioned machine after the date of the application is so essential to the respondent's case and to the matter which must be decided by the Board that the refusal of the Board to permit such evidence to be adduced would amount to a denial of natural justice and refusal by the Board to exercise its jurisdiction. We do not agree with counsel's characterization of our earlier evidentiary ruling. The Board is entitled to limit the scope of the evidence that it will permit to be adduced on the basis of such considerations as relevance to the issue in dispute. In our view, an evidentiary ruling of this type does not raise a natural justice or jurisdictional issue.

7. As indicated above, the Board's usual practice in such matters is to use the date of the application as the cut-off date for evidence of community of interest. (See, for example, *Fildebrandt Precision Industries Limited*, [1983] OLRB Rep. March 361, at paragraph 26, in which the Board noted that it "has maintained a policy of refusing to look at predicted or future facts in determining the issue of community of interest".) The Board has a similar practice concerning the duties and responsibilities of persons alleged to exercise managerial functions or to be employed in a confidential capacity in matters relating to labour relations. That practice prevents manipulation or variation of operations, plans, or job functions, and fosters Board decisions respecting community of interest based upon detailed cogent evidence concerning concrete circumstances and events that have actually occurred. Evidence of that type would not generally be available in respect of future plans or predicted events. It also tends to ensure that the party (or parties) opposite in interest to the party adducing evidence pertaining to community of interest will be in a position, through due investigation of what has in fact occurred in the place of employment, to marshal and adduce its own evidence concerning the material facts. To permit an employer to adduce evidence concerning future plans or commitments reduces not only the concreteness of some of the evidence upon which the Board is asked to rely, but also reduces or eliminates the union's ability to assess the accuracy and reliability of that portion of the employer's evidence, and to reply in a meaningful way to such evidence. The Board also has some doubts concerning how useful evidence of such plans and commitments would be in assisting the Board to consider and apply the factors which it generally takes into account in determining community of interest (such as the nature of the work performed, conditions of employment, skills of employees, administration, geographic circumstances, and functional coherence and interdependence). However, there have been a few exceptional cases (which were not drawn to our attention prior to our oral ruling in this matter) in which the Board has given some consideration to future events in determining bargaining unit scope or composition. See, for example, *Dynamic Closures Limited*, [1983] OLRB Rep. Apr. 521, and *Paris Poultry Products Limited*, [1978] OLRB Rep. May 453.

8. Having carefully considered the submissions of the parties, we are of the view that in the relatively unique circumstances of the present case, it is appropriate for the Board to permit the respondent to adduce before the Board Officer evidence concerning the shop work that has been or will be performed after August 16, 1983 by engineering department personnel on the aforementioned machine which was in the process of being built at the time of this

application. It appears to us that after the Officer's report has issued, the Board will be in a better position to determine the relevance of such evidence and the weight, if any, to be given to it in light of the details of such evidence and the submissions of the parties with respect to it.

9. Accordingly, the Board, in the exercise of its discretion under section 106(1) of the *Labour Relations Act*, hereby reconsiders and revokes its aforementioned ruling of September 27, 1983, and substitutes therefor the ruling contained in this decision.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

I dissent. I see no valid reason for reconsidering the Board's original ruling in this matter.

1182-83-R; 1183-83-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant, v. Cosa Nova Fashions Ltd. and Cosa Nova Fashions Ltd., carrying on business as **Harolds Furs**, Respondent, v. Group of Employees, Objectors

Certification – Practice and Procedure – Representation Vote – Counsel seeking to establish that certain employees did not see or could not read Board notice of taking of Vote – Inquiry made from persons other than Returning Officer – Board finding instructions in notice clear and posting adequate – Not permitting employees further opportunity to vote

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members B. Armstrong and W. H. Wightman.

APPEARANCES: *A. M. Minsky, F. DaSilva and J. Watson for the applicant; Barbara G. Crosby, Maurice Tousson and Isaac Bennitah for the respondent; Barry Edson for the objectors.*

DECISION OF THE BOARD; November 8, 1983

1. These are two applications for certification both filed August 31, 1983. Board File No. 1182-83-R is an application made with respect to a unit consisting of certain part-time employees of the respondent. The companion application in Board File No. 1183-83-R affects full-time employees. The Board's file indicates that notices to employees (Form 7) with respect to each application were posted by the employer on September 7, 1983. The terminal date fixed in each application was September 12, 1983. No employees sought to intervene in either application prior to that date.

2. By agreement dated September 19, 1983, the applicant and respondent settled an unfair labour practice complaint filed earlier by the applicant union and resolved certain issues arising in these certification applications. The parties agreed that not less than thirty-five per

cent of the employees of the respondent in each of the voting constituencies agreed upon were members of the applicant at the time the applications were made. They further agreed that the Board direct that a pre-hearing representation vote be taken of the employees of the respondent in the part-time and full-time bargaining units described as follows:

Full-time unit

all employees of the respondent in the Municipality of Metropolitan Toronto save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, designers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

Part-time unit

all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, and designers.

Having regard to this agreement of the parties, the Board ordered the agreed upon vote in a decision dated September 22, 1983.

3. In accordance with the Board's usual practice, arrangements were made for the conduct of the vote in consultation with the parties. The vote took place on September 30, 1983.
4. With respect to the part-time unit, none of the four persons on the agreed upon voters' list cast ballots.
5. With respect to the full-time unit, the revised voters' list contained the names of 274 employees. Excluding segregated ballots, 218 ballots were cast, although only 217 names were checked off on the revised voters' list. In addition a total of 17 persons not named on the voters' list attended and requested the opportunity to vote, and their ballots were segregated in accordance with the Board's usual practice in that regard.
6. At the conclusion of these votes, the scrutineers for each of the parties certified that the balloting was fairly conducted and that all eligible voters had been given an opportunity to cast their ballots in secret. The parties further consented to an immediate counting of the ballots cast, other than the 17 segregated ballots which the parties agreed were to be investigated only if they were pertinent to the outcome. In consenting to an immediate count, the parties expressly waived any objection as to regularity and sufficiency of the balloting. Of the 218 unsegregated ballots, 8 were spoiled, 115 were marked in favour of the applicant and 95 were marked against the applicant.
7. Notice of the report of Returning Officer in Form 71 was posted and given to the applicant and the respondent and to the firm of Rovet & Associates, who intervened in these proceedings on behalf of a group of full-time employees by letter dated October 7, 1983. On behalf of ten named employees, Mr. Barry A. Edson of that firm sought the opportunity to

make representations relating to the representation vote pursuant to section 70 of the Board's Rules of Procedure. The thrust of the complaint was contained in two paragraphs, which read as follows:

I am advised that employees were brought to the polling place by department and that the employees whom we represent whose names did not appear on the list were not brought to the polling station to vote. When the employees inquired as to when they would be voting, they were advised that the voting had already been completed and the ballots were counted....

Given that the results of the vote were 115-95 with 17 segregated ballots, the votes of our clients are of material importance in the disposition of the certification proceedings. We have, therefore, been instructed to request that the Board convene a hearing on this matter and that our clients be given the opportunity to cast ballots in these proceedings before this matter is finally disposed of by the Board.

8. On notice to Mr. Edson as well as to the other parties to these proceedings, the Board convened a hearing on November 8, 1983 to consider the requests set out in Mr. Edson's letter. At the outset of that hearing, the Board invited Mr. Edson to outline for us the facts he felt he could establish in evidence in support of his request. Counsel for the applicant trade union asked the Board to refuse to hear the evidence offered and dismiss this request for relief, on the ground that the facts alleged, even if proved, would not warrant action by the Board. Having regard to the nature of the allegations and the argument tendered by Mr. Edson, counsel for the employer supported the position taken by the applicant trade union.

9. At the hearing of November 8, 1983, Mr. Edson advised the Board that three of the employees named in his letter of October 7th had withdrawn their objections. The remaining seven objectors were: Franca Buffone, Pina Deliso, Jenny Chong, Ali Khan, Vana Papadoupoulos, Tony Pasqueli, Patricia Vavaroutsos.

10. The respondent carries on business in two buildings across the street from one another at numbers 420 and 479 Wellington Street West, in the City of Toronto. They are employees affected by these applications who work in each of those two buildings. In making arrangements for the conduct of the vote, the parties provided for a polling place at 420 Wellington Street West in the third floor design room to be open from 8:00 a.m. to 10:00 a.m., and for a polling place to be open on the second floor at 479 Wellington Street West from 10:30 a.m. to 12:00 o'clock noon, all on Friday September 30, 1983. A Notice of Taking of Vote (Form 69) was prepared in a number of copies. Under the title "Secret Ballot", Form 69 provides as follows:

The vote shall be by secret ballot. The Returning Officer will issue a ballot to each eligible voter presenting himself to vote at his proper polling place. The voter will mark his ballot in secret in a polling booth, fold it and deposit it in the ballot box provided at the polling place. *The Returning Officer is the proper person to whom inquiries should be directed by employees who are in doubt as to their eligibility to vote or as to the voting procedure.*

(emphasis added)

Under the heading "Eligible Voters" the Form 69 prepared in connection with these applications provide as follows:

Persons eligible to vote are:

FULL TIME UNIT:

All employees of Cosa Nova Fashions Ltd. and Cosa Nova Fashions Ltd. carrying on business as Harolds Furs in the Municipality of Metropolitan Toronto (on September 12, 1983) save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, designers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

PART TIME UNIT:

All employees of Cosa Nova Fashions Ltd. and Cosa Nova Fashions Ltd. carrying on business as Harolds Furs in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period (on September 12, 1983) save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, and designers.

(Employees in the voting constituencies who voluntarily terminate their employment or are discharged for cause between September 12, 1983 and the time the vote is taken, will not be eligible to vote).

And under the heading "TIME AND PLACE OF TAKING VOTE", the form provided as follows:

Voters may cast ballots at their proper polling place at any time during the period in which voting is to take place. The vote will be taken at the following time and place:

Date: Friday, September 30, 1983.

Hours: 8:00 a.m. to 10:00 a.m.
10:30 a.m. to 12:00 noon

Place: COSA NOVA FASHIONS
420 Wellington Street,
3rd Floor, Design Room,
TORONTO, Ontario.

COSA NOVA FASHIONS
479 Wellington Street West,
2nd Floor, Lining-Holding Area,
TORONTO, Ontario.

And in accordance with the Board's standard form, this notice contained the following sentences:

VOTERS ARE ENTITLED TO VOTE WITHOUT INTERFERENCE,
RESTRAINT OR COERCION.

THIS IS AN OFFICIAL NOTICE OF THE BOARD AND MUST NOT
BE REMOVED OR DEFACED UNTIL THE VOTE HAS TAKEN
PLACE.

11. Counsel for the employer advised us that copies of the Form 69 referred to in the next preceding paragraph were posted in both buildings occupied by the respondent. With respect to the building at 420 Wellington Street West, where all seven of Mr. Edson's clients worked, notices were posted at the security station at the entrance to the building, at the receiving door, outside both the mens' and ladies' washrooms on the second floor, beside the time-clock, elevator and ladies' washroom on the third floor, and at the time-clock, freight elevator and ladies' washroom in the basement. Employees could not enter or leave 420 Wellington Street without passing the security station at which one of these notices had been posted. The evidence of Vavaroutsos and Pasqueli would be that they had seen these notices posted on the floor on which they normally work, which is also the floor where the polling place was located on September 30th. Chong works in the same department as Vavaroutsos, but does not recall seeing notices. Khan and Papadoupoulos work in close proximity to Pasqueli. They do not read English. Buffone and Deliso work in the shipping area one floor below the floor on which the other five employees normally work. They would deny seeing any notices posted outside the washrooms on that floor. Except as just indicated, Mr. Edson conceded he had no evidence to call which would otherwise contradict the evidence which the employer was prepared to call with respect to the locations at which the Board's Form 69 had been posted. Mr. Edson also conceded that all seven of his clients were aware on September 30, 1983 that a vote was in progress with respect to union representation.

12. The allegations on behalf of Buffone and Deliso were that they are shipping clerks employed in the shipping area. On the morning of the vote they inquired of their supervisor as to whether or when they would vote. Their supervisor told them that if they were going to be given an opportunity to vote they would be called up to the polling area on the floor above. The shippers who work in the shipping area were called up to the polling area. Buffone and Deliso were not called. Their work area is separated from the shippers' work area by racks of clothes. In the afternoon of September 30th they asked their supervisor when they would get to vote. At the point the supervisor told them that the vote was over and the ballots had been counted.

13. Khan, Pasqueli and Papadoupoulos all work in close proximity to one another in an area which is close to the area in which polling took place at 420 Wellington Street West. Pasqueli and Khan saw people going to vote, and were waiting for their turn to go. Pasqueli

saw a managerial employee with a voters' list instructing people to come to vote "by department". Neither of them was directed to go and vote.

14. On the morning of the vote, Papadoupoulos saw people going to vote. She asked her supervisor whether she could vote. He supervisor told her she could not. Asked whether Papadoupoulos took the supervisor's response as a command rather than an expression of opinion, Mr. Edson conceded that the supervisor's response to her question was not taken by her as a command but, rather, as opinion or information.

15. On the morning of the vote, Vavaroutsos asked the designer for whom she worked as a sample maker whether she could vote. The designer told her she could not. It is not clear whether the designer involved in this conversation is a supervisory employee. Whether she is or not, Mr. Edson conceded that Vavaroutsos did not take the designer's answer as a command but, rather, as opinion or information.

16. Chong also works in the design department with Vavaroutsos. She is one of the employees who alleges she did not see the notices with respect to the vote. There is no allegation that she was given any misinformation by anyone. The allegation on her behalf is simply that she was not called to vote.

17. None of the employees represented by Mr. Edson alleges that anyone interfered with their having access to the polling station at the building in which they work or, indeed, for the polling station in the building across the street. There is no allegation they were physically prevented either from attending either polling station or from the reading the notices posted in the building. There is no allegation that they were instructed not to attend to vote or that they sought and were refused permission to do so.

18. It was common ground that none of the seven employees represented by Mr. Edson was named on the revised voters' list employed in connection with the vote and posted at various locations on the premises at 420 Wellington Street West. The respondent employer conceded that all seven were employees at all times relevant to their eligibility to vote, and that they did fall within the bargaining unit. The respondent trade union was not prepared to concede those facts. We dealt with the respondent's motion on the assumption that these employees might have been entitled to vote.

19. In answer to a question from the Board, Mr. Edson explained how the employees he represented had gotten together to retain him. He said Buffone learned "through general discussion in the plant" that she was part of the unit. She and Pasquale associate. They together located others. By October 4, 1983, the second business day following the vote, they had prepared a petition of some kind, written in English, which some of the seven signed, including Papdoupoulos. Papdoupoulos, it will be remembered, suffers from the disability that she neither reads nor writes English. Mr. Edson explained that Papadoupoulos can speak and understand a certain amount of spoken English and that she had had the petition explained to her before she signed. It was apparent that, once aroused, Mr. Edson's clients could discover their rights, overcome language difficulties and act quickly and decisively. In view of their apparent opposition to union representation, it is unfortunate for them that they did not take such an active interest in this application at an earlier point in time.

20. After affording counsel full opportunity to argue the merits of Mr. Edson's application on the assumption he could establish all of the facts alleged, the Board issued the following oral ruling:

Having carefully considered the submissions of counsel, we are satisfied that we need not hear the evidence Mr. Edson seeks to introduce. Mr. Edson has told us what that evidence would establish, if accepted. We are satisfied that we would not grant his clients relief even if all of their allegations were proved.

Mr. Edson conceded he could not contradict the evidence the employer would tender concerning the extensive posting of the Board's Notice of Taking of Vote. Put at its highest, the evidence tendered by Mr. Edson would establish that some employees did not see these notices, while others saw but were unable to read them because of language difficulties. This evidence would not overcome the effect of the employer's proposed uncontradicted evidence with respect to posting, which is that the Board would conclude that notice was adequate. In this regard we do also note Mr. Edson's concession that the seven employees for whom he still acts were all aware on September 30, 1983 that a vote was taking place.

If we heard the evidence tendered by Mr. Edson and accepted all of it, we could still not escape the conclusion that all his clients had had a reasonable opportunity before the vote to read the Notices and make whatever inquiries might be appropriate with respect to the instructions set out therein.

We agree with Mr. Minsky that the language of the Board's Notice is as clear as it could reasonably be in its direction that any concern about voter eligibility be addressed to the Returning Officer. The employees who addressed questions of this sort to persons other than the Returning Officer cannot fairly be heard to say that the Board has somehow failed in its duty to them.

As to the words and conduct of supervisory personnel alleged by Mr. Edson's clients, it is clear that this conduct does not go so far as to amount to an active interference with the rights of any of them to approach the Returning Officer with their concerns.

Each participant in the certification process has an obligation to actively protect and represent his or her particular interests. There is no evidence tendered to suggest that the opportunity to do so was denied any of the employees Mr. Edson represents.

We do wish to note that the interests of these employees were most ably represented by Mr. Edson, who advanced every argument reasonably available on the facts as he understood them.

In the result, the Board will not entertain or provide for the casting of any ballots other than those cast on September 30, 1983, and will not order a second vote.

We hereby confirm that ruling.

21. Having regard to the outcome of the representation vote in the part-time unit described in paragraph 2 of this decision, the applicant's application for certification with respect to that bargaining unit is dismissed.

22. With respect to the full-time bargaining unit described in paragraph 2 of this decision, it is apparent that the applicant's entitlement to certification would be unaffected by any result of the counting of the segregated ballots or of the resolution of the discrepancy between the number of unsegregated ballots cast and the number of names checked off on the voters' list.

23. Having regard to the agreement of the parties referred to in paragraph 2 hereof, the Board is satisfied that not less than thirty-five per cent of the employees in the full-time bargaining unit described in paragraph 2 of this decision were members of the trade union at the time the application was made.

24. As more than fifty per cent of the ballots cast in the representation vote with respect to the full-time unit are in favour of the trade union on any view of the matter, a certificate will issue to the applicant trade union with respect to that bargaining unit.

1365-83-R United Brotherhood of Carpenters & Joiners of America, Local 494, Applicant, v. **The Kinsmen Club of Leamington**, Respondent

Employer - Construction Industry - Incorporated non-profit organization building sports complex - Project financed by Federal and Ontario governments - "Make-work" nature of project nor non-profit purpose of respondent depriving employer status - Found to be employer who operates business in construction industry

BEFORE: Owen V. Gray, Vice-Chairman and Board Members W. Gibson and S. Cooke.

APPEARANCES: *Dave Watson, Dale Chappell and Jim Carron for the applicant; George W. King and Jacob de Jong for the respondent.*

DECISION OF THE BOARD; November 23, 1983

1. This is a construction industry certification application in which the respondent says it is not the "employer" of the persons who would be included in the bargaining unit described in the application, namely:

(a) all carpenters and carpenters' apprentices employed by the employer

in the industrial, commercial and institutional section of the construction industry in the Province of Ontario; and

- (b) all carpenters and carpenters' apprentices employed by the employer in Board Area 1, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

In the alternative, the respondent says that the proper employer may be a joint venture consisting of the respondent, the Ontario Government and the Federal Government. The applicant made no attempt to add those governments as parties to this application.

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- 3. The parties were in agreement on the facts which they felt would be necessary for a determination of the question raised by the respondent.

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- 4. The respondent is a non-profit incorporated service organization with 57 members. Adopting for a moment the neutral language employed by applicant's counsel, it is "involved" in a project to build a sports complex to be known as the Frank T. Sherk Recreation Centre. The building is being built on lands owned by the respondent and located on Sherk Street in Leamington, Ontario. Project costs are expected to exceed 5 million dollars. The project has created employment for some 300 or more people, including members of the applicant. The parties are agreed that the project falls within the industrial, commercial and institutional sector of the construction industry.

- 5. Financing for phase 1 of the project, which is expected to be complete at the end of December, 1983, and involve over \$3 million in project costs, comes from the Federal and Ontario governments under their "N.E.E.D." and "B.I.L.D." programs, respectively. This funding is the subject of an agreement dated May 24, 1983 between the Canada Employment and Immigration Commission, the Government of Ontario (as represented by the Minister of Labour) and the respondent (which is referred to in the body of the agreement as the "Project Sponsor"). The recitals to this agreement read as follows:

WHEREAS CANADA AND ONTARIO have agreed to contribute equally to a job creation program known as the CANADA ONTARIO EMPLOYMENT DEVELOPMENT PROGRAM;

AND WHEREAS CANADA conducts a program known as New Employment Expansion and Development program pursuant to which contributions may be made to assist PROJECT SPONSORS to carry out approved projects specifically designed to create incremental employment in Canada for unemployed persons who have exhausted all available unemployment insurance benefits or are in receipt of social assistance;

AND WHEREAS ONTARIO contributes to job creation programs through the Board of Industrial Leadership and Development pursuant to

which contributions may be made to assist PROJECT SPONSORS to carry out approved projects;

AND WHEREAS the PROJECT SPONSOR has implemented or intends to implement such a project and has presented a Project Proposal which has been approved by CANADA and ONTARIO;

AND WHEREAS CANADA and ONTARIO are prepared to make a contribution to the PROJECT SPONSOR with respect to the approved project;

NOW, THEREFORE, THIS AGREEMENT WITNESSES that, in consideration of the covenants and undertakings herein contained, the parties agree as follows:

Relevant provisions of the agreement itself include:

- 1.A) *The PROJECT SPONSOR hereby undertakes and agrees to carry out the project described in Schedule A to this agreement in a manner acceptable to CANADA and ONTARIO.*
- B) *CANADA hereby undertakes and agrees to make a contribution not exceeding the Maximum Federal Contribution specified in Schedule A for each item identified therein which CANADA in its absolute discretion considers to be directly related to and necessary for the efficient management of the project and to the attainment of the project objectives.*
- C) *ONTARIO hereby undertakes and agrees to make a contribution not exceeding the Maximum Provincial Contribution specified in Schedule A for each item identified therein which ONTARIO in its absolute discretion considers to be directly related to and necessary for the efficient management of the project and to the attainment of the project objectives.*

• • • •

3. *The project and all persons employed thereon shall be at all times under the direct supervision, management and control of the PROJECT SPONSOR or of an agent of the PROJECT SPONSOR who has been approved by CANADA and ONTARIO.*

• • • •

7. *All payments required by federal and provincial law to be made by an employer including Income Tax, Workman's Compensation, Unemployment Insurance, Canada Pension and holiday pay shall be the sole and absolute responsibility of the PROJECT SPONSOR and, unless waived by CANADA and ONTARIO, the PROJECT SPONSOR*

shall establish prior to receipt of any contribution that all registration requirements pertaining to such payments have been completed.

• • • •

9. The PROJECT SPONSOR shall be solely and absolutely responsible for any liability arising from a contract between the PROJECT SPONSOR and any sub-contractor engaged to undertake a portion of the project.

• • • •

11. Nothing in this agreement shall be deemed to authorize the PROJECT SPONSOR to contract for or incur any obligation on behalf of CANADA or ONTARIO.

Recruitment

12. Unless otherwise authorized by CANADA, *the PROJECT SPONSOR shall use the services of Canada Employment Centres to recruit employees* for the project.

13. All *persons to be employed by the PROJECT SPONSOR* on the project shall be legally entitled to work in CANADA and must be unemployed and have exhausted all available unemployment insurance benefits or must be unemployed and in receipt of social assistance.

• • • •

- 24.A) If a portion of the contribution made by ONTARIO made under the terms of this agreement has been used for the purchase of assets which have not been physically incorporated into the final product of the project, ONTARIO, at its discretion, may direct that the assets so purchased

(i) be sold at a fair market value and the funds realized from such sale be applied to project costs,

(ii) be turned over to registered charitable organizations,

(iii) be retained by the project in cases where the PROJECT SPONSOR satisfies ONTARIO that the project is able to continue.

- B) If a portion of the contribution made by CANADA under the terms of this agreement has been used for the purchase of assets which have not been physically incorporated into the final product of the project, CANADA, at its discretion may direct that the assets so purchased either:

(i) be sold at a fair market value and the funds realized from such sale be immediately paid over to CANADA,

(ii) be turned over to a registered charitable organization,

(iii) be retained by the project in cases where the PROJECT SPONSOR satisfies CANADA that the project is able to continue,

or

(iv) be turned over to CANADA for transfer to the Crown Assets Disposal Corporation;

• • • •

(emphasis added)

6. The respondent's application for assistance under the NEED and BILD programs is incorporated as a schedule to and forms part of this agreement. Relevant stipulations in the application include the following:

LIAISON AND HIRING

The sponsor shall appoint one club member as primary contact/liaison person responsible for the construction phase of the project. This person will be responsible for any liaison between the sponsor and the site supervisors, Employment Development Branch, Valdez Engineering Ltd. and the Town of Leamington.

The sponsor shall appoint one club member as primary contact/liaison person responsible for financial control of the project. This person will be responsible for any liaison between the sponsor and the site supervisors, Employment Development Branch, and Valdez Engineering Ltd..

Sponsor shall form a hiring committee composed of 1) Kinsmen members, preferably one representative should have some construction expertise; 2) Valdez Engineering.; 3) a third party with construction expertise. This committee will be responsible for hiring the Superintendent, the Expediter, the Project Coordinator, the Comptroller, and Safety Inspector.

JOB DESCRIPTIONS

The sponsor shall ensure that detailed job descriptions for the Superintendent, Expediter, Project Coordinator, Comptroller, and Safety Inspector are developed on/or before June 6, 1983. Copies of the job descriptions should be distributed to: 1) Personnel hired on all of the above positions; 2) Liaison persons appointed by the Kinsmen; 3) Employment Development Branch.

these job descriptions should clearly designate lines of authority and responsibility.

PERSONNEL GUIDELINES

Sponsors are required to establish personnel guidelines for all employees on Employment Development Branch projects. A copy of the personnel guidelines signed by each employee, will be kept on file. The personnel guidelines will include hours of work, rate of pay, duration of the project, place of employment, travel and overtime requirements and compensation, name or position of supervisor, procedures for handling unsatisfactory performance and termination of employment and other items contained in the personnel guidelines are to be consistent with the Agreement between the sponsor and Canada/Ontario.

UNIONS

The sponsor hereby certifies that arrangements have been made with all unions involved permitting the implementation of the project.

(emphasis added)

7. Persons engaged on this project have been obtained from or through the appropriate Canada Employment Centre office. The parties agree that the respondent has the power to terminate these employees and has in fact fired employees. Employees on the project are paid by cheque drawn on an account maintained and controlled by the respondent. The payor named on these cheques is "Kinsmen Club of Leamington - Leamington Sports Complex Task Force Payroll Account."

II

8. Counsel for the respondent argues that it is in a position analogous to that of the owner on a construction project on which a general contractor is engaged. In the ordinary manifestation of that arrangement, the owner's position is that it wants a building built. It seeks out a general contractor, who supplies the material and labour necessary to construct the building. The general contractor engages its direct work force and the services of subcontractors in these tasks. If the persons supplying labour and materials are not paid in accordance with their arrangements, they become entitled to register Mechanics' Liens against the land. These liens provide them with the ultimate right to cause the building to be sold in the event the owner's obligations remain unfulfilled.

9. The analogy drawn by the respondent is this. It also wanted a building built. Its position differs from that of the typical owner only in that it cannot pay to have the building built. The relevant governments, on the other hand, want to employ people. The respondent agrees to give them an opportunity to do so, in return for the governments' undertaking to provide the necessary monies for labour and materials. The respondent merely volunteers its services as supervisor and acts as an accounting and "paymaster" office in the disbursement of the governments' money to the employees, subcontractors and material suppliers engaged in the project. At the end of the project, the respondent receives a completed building, just

as the owner does in the conventional situation. To complete the analogy, the respondent argues that its failure to properly supervise distribution of funds may result in the seizure and sale of its building under paragraph 24 of the agreement, a result which it sees as the equivalent of the ultimate remedy available to mechanics' lien claimants against the lands of an owner in the conventional construction situation.

10. On the basis of this analysis, the respondent argues that it is not an employer within the meaning of section 117(c) of the *Labour Relations Act*, and that this application cannot, therefore, be treated as an application for certification within the meaning of section 119 of the Act. Section 117(c) of the Act reads as follows:

- (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

The respondent notes that "employer" is defined only in section 117. He maintains that this may lead to results different from those which have been reached in cases outside the construction industry. This is said to be because there are special circumstances in the construction industry, one of which is that a different set of rights flow from a successful certification application. Counsel did not say which of these differences should result in a different approach to identifying an employer. Relying on the analogy he draws with the conventional construction arrangement, however, counsel for the respondent suggests that section 117(c) applies to the general contractor, but not to the owner. As he maintains that the respondent is in a position analogous to an owner and not to that of a general contractor, he says that the respondent cannot fall within that definition.

11. The respondent acknowledges that there is in the language of the agreement between it and the Federal and Ontario governments language which would point to it as being the employer. It argues that it is, at most, an employer in name only. But for government money, it says, there would be no building. It argues that the use of the respondent as a paymaster is intended merely to give the otherwise unemployed workers on the project a sense of genuine employment rather than the feeling that they are "working on poge". We are asked to take into account that this is a "one shot", "make-work" project. We are invited to consider the degree of control exercised by the governments through the provisions of the agreement which give those governments the right to inspect the project from time to time, to review the books and records which the agreement requires the respondents to maintain and to withhold payment if the respondent fails to comply with any provision of the agreement or if either government is otherwise not satisfied with the progress of the project. This range of controls is said to be aptly summarized in section 1(a) of the agreement, by which the respondent undertakes to carry out the project "in a manner acceptable to Canada and Ontario." The respondent argues, in short, that the Federal and Ontario governments control all matters of substance in this construction project. The respondent especially relies on paragraph 12 of the agreement, which it characterizes as a stipulation that the governments in question do the hiring of the employees.

12. The applicant union argues that the respondent's "owner/contractor" analogy is inapt. The applicant describes the respondent as an owner who has chosen to act as its own

general contractor. The governments in question are merely involved as funding sources. They act in a capacity analogous to that of the bank or financial institution which provides the financing in the conventional construction project. Counsel for the union draws our attention specifically to paragraph 3 of the agreement, and invites us to draw the conclusion that its terms clearly constitute the respondent as the employer of workers on the project. He invites us to reject the alternate argument that the respondent has somehow formed a joint venture together with the governments, and in that regard draws our attention to paragraph 11 of the agreement. With respect to the respondent's argument based on paragraph 12 of the agreement, the union characterizes this as nothing more than a requirement that the respondent obtain its labour from a particular hiring hall. He argues that the fact that an employer hires through a hiring hall does not make it any less an employer.

13. Counsel for the respondent noted that no reported case deals with the questions before us in the context of the particular government programs involved here. He referred us, however, to the following cases involving the funding of wages of under government programs: *Kelowna Centennial Museum* [1977] 2 Can. LRBR 285 and *Waterloo Catholic School Board*, [1977] OLRB Rep. Dec. 856. He also cited the following cases as authority for the proposition that the funding source for wages will not always be the employer: *Province of Ontario Board of Internal Economy*, [1980] OLRB Rep. Jan. 88; the dissent of Mr. Justice Beyda in *University of Regina v. CUPE*, (1979) 101 D.L.R. (3d) 124 (Sask. C.A.); and *Board of Governors of the University of Alberta* [1982] 1 Can. LRBR 78. With respect to the interpretation of section 117(c), the applicant refers us to the long line of cases beginning with *Tops Marina Motor Hotel*, [1964] OLRB Rep. Jan. 583.

14. In reply, the respondent acknowledges the several decisions of this Board dealing with government funded "make-work" programs. He distinguishes the case before us on the basis that none of those decisions dealt with a construction industry certification application.

III

15. No one suggests that the persons whom the applicant seeks exclusive authority to represent are doing work in any capacity other than that of employee. It is not suggested that they are volunteers or students or independent contractors. The argument and agreed statement of fact both assume that the workers affected by this application have an employment relationship with someone.

16. The fact that an employment relationship is brought into existence by a government "make-work" program does not itself take that relationship beyond the reach of the *Labour Relations Act*: *Kelowna Centennial Museum Association*, *supra*; *Waterloo County Roman Catholic Separate School Board*, *supra*; *Regional Municipality of Hamilton-Wentworth*, [1982] OLRB Rep. Aug. at 1179 (dissent reported at [1982] OLRB Rep. Oct. 1481); and, *Industrial Resource Centre (Windsor/Essex) Inc.*, [1982] OLRB Rep. Oct. 1482.

17. The definition of "employer" in what is now section 117(c) of the *Labour Relations Act* has been examined in numerous decisions of this Board, including: *Tops Marina Motor Hotel*, *supra*, *Kanadia Niagara Falls Limited*, [1966] OLRB Rep. April 9; *Automatic Fuels Limited*, [1966] OLRB Rep. April 22, *Tricont Projects Limited*, [1966] OLRB Rep. May 121, *Hareb Development Limited*, [1968] OLRB Rep. May 181, *Loblaw Groceries Co. Limited*, [1969] OLRB Rep. June 392, *Mattagami Lake Mines Limited*, [1970] OLRB Rep. Feb.

1356, *Kupuskasing Board of Education*, [1972] OLRB Rep. June 587, *Ameri-Cana Motel Ltd.*, [1972] OLRB Rep. Dec. 997, *Group Thirty-Three Limited*, [1974] OLRB Rep. Dec. 888, *The Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 145 (Judicial review denied sub. nom. *Re City of Toronto and Carpenters' District Council of Toronto and Vicinity*, 1980, 27 O.R. (2d) at 673), *258167 Vending Company Limited*, [1979] OLRB Rep. June 595, *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62 (Judicial review denied, Ontario Divisional Court, January 29, 1981 (unreported)), *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831; and *City of Kitchener*, [1983] OLRB Rep. Sept. 1490. These decisions establish that a person may be an "employer" within the meaning of section 117(c) even though its primary "business" is not in the construction industry, it does construction work only for its own benefit and not for others, and the project active at the date of the application is the only construction project in which it has ever engaged or ever intends to engage. A person may also fall within the s.117(c) definition of employer even though it does not engage in construction or any other business with a view to or hope of making a profit. In effect, the Board asks whether the putative employer was engaged in construction activity at the date of the application, and broadly interprets the phrase "operates a business" as describing the state of being busily engaged in an activity (see *Re City of Toronto and Carpenters' District Council of Toronto and Vicinity*, *supra*, at page 674). Thus, a non-profit entity such as a board of education or municipal corporation may be an "employer" within the meaning of section 117(c) if it acts as its own contractor in building a swimming pool (*Kupuskasing Board of Education*, *supra*) engages carpenters to do restoration and remodelling (*City of Toronto*, *supra*, *The Municipality of Metropolitan Toronto*, *supra*) engages plumbers to do repair work (*The Board of Education for the City of Windsor*, *supra*) or employs bricklayers to erect partitions and walls in public buildings (*City of Kitchener*, *supra*).

18. The mere fact that construction activity is undertaken with the assistance of government funding under a "make-work" program has not affected the general principles outlined in the preceding paragraph. Indeed, in *Kupuskasing Board of Education*, *supra*, the respondent Board of Education was constructing a swimming pool with the assistance of a grant from the federal government under the Local Initiatives Program. In that case:

The respondent informed the Board that by virtue of the conditions attached to such grant, the respondent had agreed to operate as a general contractor and that it was also obliged to hire new employees required for such construction which it did not already have on its payroll through the Canada Manpower Centre.

The Board there concluded:

While it is quite clear that the general nature of the respondent's business is education, it is also apparent that it has entered the field of construction for the purpose of constructing a swimming pool."

19. Accordingly, nothing in the nature of the respondent or of the project prevents the applicant from being found to be an "employer" within the meaning of section 117(c).

20. As noted earlier, the question about the workers affected by this application is not "Are they employees?" but "Whose employees are they?". In seeking an answer to that

question we do not propose to pursue the analogies offered by the respondent any farther than to observe that an owner may also be a contractor and that lending institutions, particularly public ones like C.M.H.C., may exert a degree of control over aspects of a construction project comparable in degree and kind to that which may be exercised by the governments involved here, without thereby becoming the employer of the workers engaged on the project. The analogy is not particularly discriminating from a labour relations point of view. It is from that point of view that we must approach the problem, and from that point of view the Board's jurisprudence provides considerable assistance.

21. In *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, the Board developed seven indicia to assist it in determining which of two or more entities is the employer for the purposes of the *Labour Relations Act*. These are: (1) the parties exercising direction and control over the employees performing the work; (2) the party bearing the burden of remuneration, (3) the parties imposing the discipline, (4) the party hiring the employees, (5) the party with the authority to dismiss the employees, (6) the party who is perceived to be the employer by the employees, (7) the existence of an intention to create the relationship of employer and employee. These indicia have been used in a number of cases to assist the Board in identifying the employer. Some of these cases were reviewed in *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538. The results of that review are summarized in the following passage from the Board's decision in that case:

A look at the jurisprudence highlights the wide variety of factual combinations that present themselves in cases where the Board is called upon to identify the employer. It is apparent on review that no one of the seven criteria set out in *York Condominium* is determinative in all cases. In *G.E.M.* and *Alwell Forming*, for example, the company which hired the employees was not found by the Board to be the employer. In *Ralston, Tower Company, Board of Internal Economy and Templet*, on the other hand, the entity responsible for hiring was found to be the employer. In *Ralston, Board of Internal Economy* and *G.E.M.* the entity supervising the employees on a day-to-day basis was found to be the employer while in the *Tower Company* and *Boeing of Canada* it was not. In *Templet* and *G.E.M.* the company paying the wages was found to be the employer. In the *Board of Internal Economy* it was not. In *Ralston* and for some employees in *Alwell Forming* the Board concluded that the company from whose account the wages were drawn was not the entity which actually bore the burden of remuneration. In *Ralston* and *Alwell Forming* the group which bore the burden of remuneration was identified as the employer, and in *Board of Internal Economy* it was not. In *G.E.T.* and *Alwell Forming* the Board's finding was consistent with the perception of the parties. In *Kent Line Ltd.* this would appear not to have been the case.

The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not.. The

significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

A particularly important question answerable through an evaluation of all of the factors set out in *York Condominium* is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in *York Condominium* inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of *The Labour Relations Act*.

22. It should be noted there is nothing unique about the construction industry which prevents the application of the tests outlined in *York Condominium Corporation* to a construction industry situation. Indeed, those tests have been applied in the construction industry: *Thunderhawk Developments*, [1983] OLRB Rep. Aug. 1378.

IV

23. Applying the *York Condominium* tests, indicia numbered 1, 3, 5 and 6 unequivocally favour a finding that the respondent is the employer. With respect to test number 2, "the party bearing the burden of remuneration", we note that the respondent's agreement with the Federal and Ontario governments does not oblige those governments to pay wages, but merely to make a contribution toward those wages. While that contribution presently stands at 100 per cent of labour costs, there is nothing in the agreement that would prevent continuation of the project if the respondent becomes subject to increases in wage costs which are not covered by the subsidy presently provided in the agreement. This test, therefore, does not point strongly in any direction.

24. With respect to the fourth test, "the party hiring the employees", the question is whether the respondent's obedience to the requirement that it "use the services of Canada Employment Centres to recruit employees for the project" makes the respondent any less the person hiring the employees. We consider it does not.

25. With respect to the seventh test, "the existence of an intention to create the relationship of employer and employees", we take into account the provisions of the agreement cited in paragraphs 5 and 6 of this decision. The only other entities with the potential to be the employer are party with the respondent to this agreement. The language of the agreement evidences an intention on the part of all the potential employers that the respondent shall fulfill

that role and that nothing in the agreement shall constitute either of the governments as joint venturers in the employment of anyone working on the project. While those governments retain a considerable degree of control over a number of aspects of the project, the agreement puts the respondent squarely in control of those matters which are the normal subject of collective bargaining.

26. However dependent the respondent may be on the Federal and Ontario governments for financing of this project, we conclude that the respondent alone exercises fundamental control over the incidents of employment of the employees for whom the applicant seeks exclusive bargaining rights, and must therefore be considered their employer.

[Balance of decision finding union status, bargaining unit appropriateness, membership support etc omitted].

0768-83-U J. L. Livitski, Complainant, v. Service Employees' Union, Local 268, (A.F.L., C.I.O., C.L.C.), and Larry O'Brien, President Thereof, Respondents

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Whether prima facie case made out - discharged employee pressuring union through M.P. - Union not showing prejudice resulting from 1 1/2 year delay in filing complaint - Board not refusing to entertain complaint

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: *Donald R. Colborne for the applicant; H. Goldblatt, B. Sheehan and L. O'Brien for the respondents.*

DECISION OF THE BOARD; November 7, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of section 68 of the Act.

• • • •

3. Section 68 of the Act provides as follows:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

4. To date, the Board has not yet heard any evidence in this matter. However, it appears to be common ground that the complainant, Mrs. J. L. Livitski, was formerly employed by the Corporation of the City of Thunder Bay in its homes for the aged, and as such came within a bargaining unit represented by the respondent trade union. It also appears to be common ground that towards the end of 1981 Mrs. Livitski was formally terminated. By way of this complaint, Mrs. Livitski alleges that the respondent trade union violated section 68 of the Act. The main thrust of the complaint is that Mr. Larry O'Brien, the union's president, failed to properly advise Mrs. Livitski, failed to submit certain grievances on her behalf, and generally failed to protect her interests.

5. Section 89 of the Act gives the Board discretion to refuse to inquire into a complaint such as this. By way of a preliminary motion, counsel for the trade union contended that the Board should exercise this discretion and decline to inquire into Mrs. Livitski's complaint. Union counsel initially raised three grounds in support of this submission. One of these grounds was based upon the claim that Mrs. Livitski is not capable of returning to work, and hence, even if she were to be successful in this complaint, the Board would not be able to award her any meaningful remedy. The accuracy of the alleged facts upon which this contention was based, however, was challenged by Mrs. Livitski's counsel. Accordingly, the issue is one that cannot properly be dealt with by way of a preliminary motion, but must instead await the calling of evidence.

6. The second ground advanced by the trade union as to why the Board should not entertain the complaint was based upon the contention that the complaint on its face does not make out a *prima facie* case. In this regard, counsel for the union noted that the complaint relies upon an alleged lack of action on the part of the union and Mr. O'Brien, but nowhere contends that Mrs. Livitski asked them to take any steps on her behalf. At the hearing, the Board orally indicated that, given the material before it, at this stage of the proceedings it would be premature to conclude that Mrs. Livitski did not have a proper complaint under section 68. Any ruling as to the merits of the complaint must await a hearing at which the parties will have an opportunity to lead evidence with respect to their respective positions.

7. The third ground relied on by the respondents relates to Mrs. Livitski's delay in filing this complaint. Mrs. Livitski was apparently off work due to illness commencing in late 1980. In the spring or summer of 1981 she sought to return to work, but her employer declined to take her back on the grounds that she was unable to perform the work associated with her job. Mrs. Livitski was formally terminated during or about the month of December, 1981, allegedly because she had been off work for a full year. Notwithstanding these facts, this complaint was not filed with the Board until July 11, 1983. Union counsel contends that this delay was just too great, and the respondents should not now have to deal with events that occurred so long ago.

8. According to Mrs. Livitski's counsel, when Mrs. Livitski realized that she had a problem, she sought the assistance of her local member of the Federal Parliament. In September of 1981 the M.P. (or someone acting on his behalf) wrote the International Office of the respondent trade union with respect to Mrs. Livitski's situation, but did not receive a reply until January 22, 1982. At some point shortly thereafter, Mrs. Livitski herself wrote to the International Union, to which she received a reply on or about April 27, 1982. In the summer of 1982, Mrs. Livitski entered into a training course and did nothing further about this matter until September of 1982 when she contacted a lawyer. After a delay of about three months

this lawyer advised Mrs. Livitski that he would not be able to assist her. Mrs. Livitski received a similar response from a legal clinic which she also approached. Mrs. Livitski's M.P., who had in the meantime been making inquiries about the possible avenues of redress open to her, contacted the Board's offices in early January of 1983. On or about February 21, 1983 the M.P. wrote to the Board requesting the necessary forms for filing a complaint under section 89. In March or early April of 1983 Mrs. Livitski, by way of the lawyer referral service, made contact with the lawyer who is now representing her in these proceedings. This lawyer assisted Mrs. Livitski in completing the section 89 forms, which were filed on July 11, 1983.

9. In a number of cases the Board has indicated that excessive delay in filing a complaint may lead to the Board refusing to hear it. The Board has not, however, developed any hard and fast rules as to how great the delay must be before the Board will refuse to hear a complaint. Rather, as indicated in the *Corporation of the City of Mississauga* case [1982] OLRB Rep. March 420, the Board will take into account factors such as: the length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed; and whether fading recollections, the unavailability of witnesses, etc. would hamper a fair hearing. In the instant case, the respondents have not pointed to any concrete way in which they will suffer real prejudice as a result of Mrs. Livitski's delay. Counsel for the union did contend that if Mrs. Livitski is successful in her complaint, and if by way of remedy, the Board directs the union to go to arbitration with respect to her employment status, then due to the delay involved the arbitration award may adversely impact on the rights of both the union and the employer, as well as on the relationship between them. While there may be some merit to this contention, we incline to the view that the issue is one that can satisfactorily be dealt with by the Board in fashioning an appropriate remedy should Mrs. Livitski be successful in her complaint, and that it need not result in the Board refusing to hear her complaint completely.

10. We have no doubt that Mrs. Livitski should have more actively pursued her own inquiries about how to seek possible recourse against the union, particularly once it became apparent that her M.P. was not able to quickly obtain the relevant information for her. However, when all things are considered, we do not feel that the Board should refuse to hear the complaint. If Mrs. Livitski should prove to be successful in her complaint, however, we are satisfied that any remedy should be adjusted to ensure that the trade union is not required to bear the costs associated with the time period between when Mrs. Livitski should reasonably have filed her complaint, and the time that she actually did so. A determination as to the time span involved can be dealt with during the hearing into the merits of the complaint.

11. The matter is referred to the Registrar to be re-listed for continuation of hearing.

2529-82-M Edward Miller, Complainant, v. Fuel Oil and Natural Gas Service Technicians Association, Respondent

Financial Statement – Practice and Procedure – Act entitling member only to statement for last fiscal year – Allegations of fraud not proper subject for Board to deal with – Alleged threats by union must be made in separate unfair labour practice complaint – Complainant's questioning of expenses incurred by union and accounting procedures not causing Board to direct new statement

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members F. W. Murray and S. Cooke.

APPEARANCES: *Peter Libman and Edward Miller for the complainant; R. Wells, Robert Judges, Roy Wickett and Radko Deangelis for the respondent.*

DECISION OF THE BOARD; November 7, 1983

1. This is a complaint under section 85 of the *Labour Relations Act* relating to the furnishing of a financial statement.

2. Section 85 provides as follows:

“85.-(1) Every trade union shall upon the request of any member furnish him, without charge, with a copy of the audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy, and, upon the complaint of any member that the trade union has failed to furnish such a statement to him, the Board may direct the trade union to file with the Registrar of the Board, within such time as the Board may determine, a copy of the audited financial statement of its affairs to the end of its last fiscal year verified by the affidavit of its treasurer or other officer responsible for the handling and administration of its funds and to furnish a copy of such statement to such members of the trade union as the Board in its discretion may direct, and the trade union shall comply with such direction according to its terms.

(2) Where a member of a trade union complains that an audited financial statement is inadequate, the Board may inquire into the complaint and the Board may order the trade union to prepare another audited financial statement in a form and containing such particulars as the Board considers appropriate and the Board may further order that the audited financial statement, as rectified, be certified by a person licensed under the *Public Accountancy Act* or a firm whose partners are licensed under that Act.”

3. The respondent trade union, which is a relatively small organization of approximately 24 members, represents the employees of only one employer. The union has been in operation for about four years. Prior to the events giving rise to these proceedings, the union

did not maintain any organized system for recording its financial affairs. Indeed, it appears that its only permanent financial record consisted of the entries in a bank pass book.

4. The applicant, Mr. E. Miller, is a member of the union. He originally filed this application so as to obtain an audited financial statement of the union's affairs during its 1982 fiscal year. In response to the application, the union retained the services of Lacasse Bookkeeping Services Limited, which prepared a statement of the union's revenue and expenses for the year 1982 as well as a bank reconciliation statement. Across the bottom of the statements was the notation "prepared without audit".

5. This complaint first came before a differently constituted panel of the Board on or about June 13, 1983. At that time, the union acknowledged that the statements prepared by the bookkeeping service were inadequate, and undertook to provide Mr. Miller with audited financial statements by August 1, 1983. On August 5, 1983, some four days after the deadline, the union provided Mr. Miller with audited financial statements prepared by the firm of Rose, Ford, chartered accountants.

6. The audited financial statements were not verified by the affidavit of an officer of the union, as contemplated by section 85(1). At a hearing before this panel of the Board, union counsel undertook to file such an affidavit. An affidavit by Mr. Robert Judges, the president of the union, verifying the audited statements, was received by the Board on September 2, 1983.

7. The audited financial statements prepared by Rose, Ford consist of a statement of revenues, expenses and surplus for the year ended December 31, 1982 as well as a balance sheet as at December 31, 1982. The statements are headed up by an auditors report stating as follows:

"AUDITORS' REPORT

To the Members of Fuel Oil & Natural Gas Service Technicians Association:

We have examined the balance sheet of the Fuel Oil & Natural Gas Service Technicians Association as at December 31, 1982 and the statement of revenues, expenses and surplus for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.

In our opinion, these financial statements present fairly the financial position of the association at December 31, 1982 and the results of its operations for the year then ended in accordance with generally accepted accounting principles.

July 29, 1983. ("Rose, Ford")
Chartered Accountants."

At the end of the financial statements are contained the following notes:

“1. ORGANIZATION

The Association is an accredited labour union and is subject to the Labour Relations Act (Ontario).

2. SIGNIFICANT ACCOUNTING POLICIES

The financial statements have been prepared on an accrual basis.

3. COMPARATIVE FIGURES

No comparative figures have been presented because the Association did not prepare financial statements for the prior period.”

8. Mr. Miller raised certain objections to the adequacy of the audited financial statements prepared by the firm of chartered accountants, and accordingly, the matter came on for hearing before this panel of the Board. At the hearing, Mr. Miller raised a number of questions concerning certain expenses reflected in the financial statements, including questions related to a detailed breakdown of certain expenditures. Officials of the union present at the hearing orally provided Mr. Miller with detailed information concerning the union's operations and expenses. Mr. Miller did not challenge the accuracy of any of this information. We are satisfied that by and large the information provided at the hearing answered Mr. Miller's questions concerning the nature of the union's expenses during 1982. This is not to say that Mr. Miller agreed with the way that the money was spent. Indeed, he clearly did not, being of the view that certain expenses should never have been incurred. Nevertheless, he is now aware in some detail as to how the money was spent.

9. At the hearing Mr. Miller voiced a concern with the fact that there were a number of differences between the unaudited statements prepared by the bookkeeping firm and the audited financial statements prepared by the firm of chartered accountants. The differences between the two sets of financial statements, however, is not something that causes us any difficulty. Given the higher professional standing of the firm of chartered accountants, and the fact that the accounting firm performed an audit whereas the bookkeeping service did not, we feel it quite appropriate to rely only on the statements prepared by the firm of chartered accountants. In passing, however, we would note that at least part of the difference between the two sets of statements appears to be due to the different approaches adopted by the bookkeeping service and the firm of chartered accountants. For example, Mr. Miller voiced a specific concern about the different amounts credited to the union at the start of 1982. The bookkeeping service prepared a bank reconciliation statement which showed a beginning bank balance of \$4,315.65 while the firm of chartered accountants in a statement of revenues, expenses and surplus showed a surplus at the start of 1982 of \$3,626.00. At least part of the difference between these two figures appears to be due to the fact that whereas the statement prepared by the bookkeeping service purported to reflect the actual cash position of the union at the start of the year, the firm of chartered accountants prepared its statement on an accrual basis, and hence from the cash actually held by the union at the start of 1982, there would have been deducted amounts to cover expenses incurred during 1982 but not as yet paid for.

10. With respect to the \$3,626.00 figure which the firm of chartered accountants recorded as being the surplus at the beginning of 1982, it was Mr. Miller's contention that the only way the accountants could have properly ascertained this figure was from proper financial statements for 1981. Since no such financial statements had been prepared, it was Mr. Miller's contention that the Board should now direct the union to prepare financial statements for its

1981 fiscal year. We do not agree. In this regard, we would note that section 85 only requires a union to provide a member with a financial statement "to the end of its last fiscal year". The section makes no reference to financial statements for preceeding years. We would note also that even if financial statements were to be prepared for 1981, (which given the lack of proper financial records would at this stage likely prove to be difficult if not impossible) such statements would themselves be subject to the defect that the opening balance was not supported by a proper financial statement for the preceeding year. Also highly relevant to this matter is the fact that the union before us is a small organization of only some 24 members. In our view, any possible benefits to its membership, including Mr. Miller, of requiring that the union now go back beyond 1982 to provide proper financial records would not be justified by the costs involved. Accordingly, even if we were to assume that the Board has the authority to direct the preparation of financial statements for periods prior to a union's last fiscal period, in our view this is not an appropriate case in which to do so.

11. At the hearing, Mr. Miller raised a number of questions with respect to an entry of \$2,605.00 under the heading of "directors' expense" in the statement of revenues, expenses and surplus prepared by the firm of chartered accountants. Mr. Miller contended that this figure should be broken down, and an explanation given as to how it was arrived at. Mr. Judges, the president of the union, explained that members of the union, including the union's directors, are not on salary, but are paid by their employer only for the work that they perform. Accordingly, to reimburse the union's directors for the time that they are away from their regular employment attending to union business, the union reimburses them at a rate of \$10.00 per hour plus expenses. Mr. Judges indicated that most of the time for which the directors received such compenstion involved the processing of a number of grievances related to alleged violations of a collective agreement by the employer. One of these grievances involved a successful attempt to have Mr. Miller reinstated in his employment after he had been discharged.

12. Another issue raised by Mr. Miller with respect to the financial statements prepared by the firm of chartered accountants concerned the manner in which they dealt with an account rendered to the union by S. L. Consultants. The account related primarily to the services of Mr. Stephen Lewis, who had been retained by the union in 1981 to help negotiate a two year collective agreement with the company that employed all of the union's members. It appears that while Mr. Lewis performed all of his services in 1981, he was paid partly in 1981 and partly in 1982. The firm of chartered accountants treated a portion of Mr. Lewis' account as an expense in 1981, and the remainder as an expense referable to 1982. Mr. Miller contends that all of the amount should properly have been treated as a 1981 expense, and accordingly, in his view, the statements prepared by the firm of chartered accountants are inaccurate. According to Mr. Miller, given this alleged inaccuracy, the Board should direct that new financial statements be prepared for 1982.

13. Section 85(2) empowers the Board to in certain circumstances require the preparation of additional financial statements. We are satisfied, however, this is not an appropriate case in which to do so. Mr. Miller is aware of the services performed by Mr. Lewis, the year Mr. Lewis performed them, and the amount of Mr. Lewis' fee. Mr. Miller's contention is not that he does not know the relevant facts, but only that the firm of chartered accountants treated the expense involved as being referable to two separate fiscal periods. Given these facts, even if we did share Mr. Miller's view that the firm of chartered accountants had made an error, we would not be prepared to direct the preparation of new financial statements, since

to do so would not serve any legitimate useful purpose. Further, it is far from clear to us that the firm of chartered accountants made an error. Although there may be much to be said in favour of a union treating the cost of professional services as an expense referable only to the fiscal year in which the professional services were rendered, it is not difficult to see how in this case the firm of chartered accountants might reasonably have concluded that a different approach should be adopted. This is particularly so given that the union had not kept proper accounting records, the collective agreement which Mr. Lewis helped negotiate was for a two year period, and S. L. Services has paid for Mr. Lewis' services in two different fiscal years.

14. Throughout most of the hearing, Mr. Miller's case was put forward by his counsel. However, towards the end of the hearing, Mr. Miller made a number of direct submissions to the Board. From these submissions, we gather that Mr. Miller is unhappy with the manner in which the union is being run, and in particular, unhappy with the union's executive, which he feels is operating in violation of the union's constitution. Mr. Miller is also of the view that the collective agreement negotiated by the union is "no good". In addition, Mr. Miller objects to a number of expenditures by the union, particularly those related to professional services. Mr. Miller concluded his submissions by charging the executive of the union with fraud and requesting that the Board place the union under trusteeship. From his submissions it is clear that Mr. Miller has misunderstood the purpose behind section 85, which is only to ensure that a union member can receive an audited financial statement of the union's affairs to the end of its last fiscal year. Mr. Miller has received such a statement. Further, at the hearing the union went further and indicated that in the future it will keep proper financial records, and on a yearly basis prepare audited financial statements. The section has served its purpose. If Mr. Miller is unhappy with the way the union is being run, he can seek to influence its affairs through its internal organs. If he feels the executive has breached the union's constitution, he has the right as a union member to seek recourse in the civil courts. Alleged breaches of the criminal law are a matter for the police and the criminal courts. Any alleged violations of provisions of the *Labour Relations Act* can be dealt with by filing proper complaints with this Board. However, none of these are matters that can be dealt with in the context of a proceeding under section 85.

15. As a final matter, we would note that at the hearing Mr. Miller alleged that he had been threatened and discriminated against by the union for bringing his complaint under section 85 of the Act. The union objected to Mr. Miller raising this allegation since it had not received advance notice that it would be an issue at the hearing. At the time, the Board orally noted that section 80 of the Act makes it unlawful for individuals to be discriminated against or intimidated because of launching proceedings before the Board. The Board added, however, that if Mr. Miller was going to allege that the union had violated section 80, he should do so in the appropriate manner by way of a complaint filed under section 89 of the Act.

16. Having regard to the above, these proceedings are hereby terminated.

0708-82-M; 0709-82-M International Association of Bridge, Structural and Ornamental Iron Workers, Applicant, v. **Ontario Hydro**, Respondent

Arbitration – Construction Industry Grievance – Practice and Procedure – Union and employer reaching oral agreement to settle discharge grievance with grievor's approval – Grievor subsequently refusing to sign minutes of settlement – Anticipated execution of written agreement not precondition for binding effect of settlement – Grievances settled and no longer arbitrable – Referring union cannot cease to be party for fee liability purposes without terminating referral

BEFORE: Owen V. Gray, Vice-Chairman and Board Members J. D. Bell and H. Kobryn.

APPEARANCES: *John M. Wissent, Norman Brown and Mike Zimmerman for the applicant; Michael Hines and Tony Mollica for the respondent.*

DECISION OF THE BOARD; November 3, 1983

1. These are two referrals concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*. These referrals were consolidated by order of this Board, differently constituted, on September 27, 1983.

2. These referrals were first scheduled for hearing on July, 1982, then adjourned sine die on consent of the parties and the Board. There was no request to reschedule these referrals until the Board received a letter from solicitors for the applicant union, dated August 23, 1983, the relevant portions of which read as follows:

We have this day been contacted by a Labour Relations Officer who advises that Mr. Norman Brown, the grievor, wishes to have these matters rescheduled for hearing and the Board requires the Union's acquiescence in this regard.

Accordingly, on behalf of the grievor, we request that the matter be rescheduled for hearing.

However, as we have previously pointed [sic] to Mr. Brown, the Union is *not* processing these Referrals on his behalf but the Union takes the position that Mr. Brown is free to do so on his own behalf. Accordingly, in arriving at hearing dates suitable to all of the parties, we suggest that the Board contact Mr. Brown directly, although we would appreciate being advised of any rescheduled hearing dates.

As a result, these referrals were scheduled for hearing September 27, 1983. When the matter came before the Board on that day, Mr. Brown was in attendance and requested an adjournment for the purpose of obtaining legal counsel. The Board then ruled that the matter would be adjourned to October 17th on terms, *inter alia*, that Brown advise the parties and the Board of the name and address of counsel as soon as counsel was retained. Mr. Brown complied with that condition prior to October 17, 1983.

3. In the meantime, the solicitors for the applicant union again wrote to the Board. The relevant portions of their letter dated October 3, 1983 are as follows:

We attended on behalf of our client the hearing in the above matter on September 27 last. We again wish to make our client's position clear. As we stated in our letter of August 23, 1983, and as we stated to the Board at the hearing, our client is not processing these Referrals on behalf of the grievor, Norman Brown, although he is free to process them on his own behalf. *Accordingly, our client is no longer the Applicant in these Referrals.*

We write to you with respect to this in view of any liability that may be incurred pursuant to Section 124(4) of the Act. *As our client is no longer the Applicant*, it is our view that such liability, if any must be borne by Mr. Brown himself.

(emphasis added)

The author of this letter was in attendance on October 17, 1983 as counsel to a witness subpoenaed by the respondent employer. At the outset of the hearing, the Board indicated to him and to counsel of record for the parties that the emphasized portions of his letter gave the Board concern with respect to its jurisdiction to continue to hear the referral. The Board's concern was whether the applicant union's characterization of itself as "no longer the applicant" was tantamount to a withdrawal of the referral.

4. The author of the letter argued that an applicant in a referral under section 124 could make any arrangement it wished with the grievor (or anyone else) to handle the presentation and argument of the grievance before the Board. He characterized the union's arrangement with the grievor as an "assignment" which made the grievor a party to the referral in place of the union. He argued that nothing in section 124 prevented the free substitution of one entity for another as party to the referral. He said that the words "parties to the Board" in subsection (4) of that section should be read together as describing whatever entities finally appear before the Board at the conclusion of the process of substitution said to be available in the manner described. No authority was offered for any of these propositions.

5. After hearing these submissions and the submissions of the other counsel involved, the Board delivered the following oral ruling:

"Notwithstanding Mr. Fishbein's submissions, we are of the view that the parties referred to in subsection (4) of section 124 of the Act are the same parties referred to in subsection (2) of that section. So long as a referral remains before this Board, the referring party cannot isolate itself from the liability which arises under subsection (4) of section 124. The referring union may make private arrangements with grievors with respect to engagement of counsel, presentation of evidence and the internal allocation of costs of the proceedings. However, so far as the Board is concerned the referring union remains a party within the meaning of section 124(4) unless and until the arbitration is completed or the referral

is withdrawn. The referring union cannot cease to be the nominal applicant without thereby terminating the referral.”

The Board hereby confirms its oral ruling.

6. In the face of the Board’s ruling, the solicitor for the union advised the Board that it would remain the named applicant in these proceedings, and that the solicitor selected by the grievor would present the applicant’s case.

7. The parties agreed on the facts set out in the balance of this paragraph. The grievor, Norman Brown, had been an employee of Ontario Hydro at the Bruce Generating Station construction project. He started work there in early 1981, and was a member of the bargaining unit described in the applicable collective agreement between the union and the Electrical Power Systems Construction Association. Brown was discharged by Ontario Hydro, allegedly for cause, on January 8, 1982. He began working again for Ontario Hydro at the same project on May 6, 1982, and continued working there until June 4, 1982, when he was laid off. By two letters dated June 16, 1982, the union grieved Brown’s discharge of January 8, 1982 and his lay-off of June 3, 1982. Those grievances were then referred to this Board, scheduled for hearing and adjourned as noted above.

8. With this background, counsel for Ontario Hydro made two preliminary objections to the Board’s jurisdiction to deal with the grievances. The first was that these grievances had been settled and there was, accordingly, nothing for the Board to arbitrate. The second was that the extreme delay in bringing the referrals back before the Board should lead the Board to decline to hear the grievances. Counsel for the employer requested that the Board hear evidence and argument on these preliminary objections before entertaining evidence and argument on the merits. Counsel for the grievor took the position that all the evidence, including evidence solely relevant to the merits, should be heard at the same time. In response to questions from the Board, counsel for the employer indicated that he would call two witnesses on the question of settlement and delay, neither of whom would be called by him on any issue relating to the merits of the grievances. On those issues he said there would be four additional witnesses. Counsel for the grievor advised the Board that he would call one or two witnesses with respect to the settlement and delay, both of whom would also be called with respect to the merits. In addition, he would call a third witness with respect to the merits of the grievances. In those circumstances, the Board advised the parties that it would hear evidence and argument limited to the issues of settlement and delay and reserve on those issues pending the continued hearing dates which would have been necessary in any event in order to hear the anticipated evidence on the merits of the grievances.

9. The respondent’s first witness was Donald J. Laut, Project Personnel Manager at the Bruce Generating Station Project. Mr. Laut has been with Ontario Hydro in various personnel capacities since January 1956. The grievance letters of June 16, 1982 were addressed to him, and he responded by letter dated June 29, 1982. While formally denying the grievances, his letter indicated a willingness to discuss them further. Mr. Laut left on vacation after this letter was sent. On his return from holiday, he learned that the Labour Relations Officer appointed in connection with these referrals had met with Mr. Miller of his staff and with the

business agent of Local 736 of the Iron Workers, Mr. Zimmerman. He was told that the Labour Relations Officer had proposed a solution which Mr. Williams, Ontario Hydro's mechanical superintendent, had rejected despite the apparent willingness of the union to consider it.

10. Thereafter, Jim Phair, General Organizer of the applicant International Union, contacted Laut to explore further the possibility of a settlement. After several discussions with Phair and with members of his staff as well as with the mechanical superintendent on the project, Laut contacted Phair by telephone at the offices of the union's solicitors. He then told Phair that Ontario Hydro was prepared to accept a settlement which would involve Brown's re-hiring at the end of August, 1982 with no retroactive pay and with a seniority date agreed to by the parties. This settlement was accepted by Phair, who said he would discuss it with Brown and reduce it to writing in the form of a "memorandum". Brown's scheduled date for return to work passed without the arrival of Brown or the memorandum. Laut did hear from Phair, however, who told him that Brown had rejected the settlement they had made.

11. In cross-examination, Laut said the discussion of a memorandum was not unusual. He expected a written statement of settlement as a matter of course when settling grievances, although the written statement would more often be generated by "signing off" on the standard grievance form usually used when a grievance is initiated. Asked why a written statement would be made after effecting what he claimed he had regarded as a firm oral agreement, Laut replied that it would be made "for record purposes".

12. The second witness on behalf of the employer was James Phair. Phair confirmed Laut's evidence. He confirmed that the terms of settlement discussed were that Brown could have his job back with seniority dating back to August 1, 1981, but without retroactivity as far as pay went. In their telephone conversation, Laut had advised him that Brown could start the next morning, which was August 24, 1982. Phair had then spoken to Brown, who was present at the union's solicitors' office. Brown agreed that he would take the settlement offered, although he did so reluctantly. When Phair told Brown that he could go to work the next day, Brown said he had prior commitments and would prefer to start the following Monday, August 30, 1982. Phair then called Laut back and told him Brown was in agreement with the terms of the settlement, but would prefer to start the following Monday rather than the following day. Laut told Phair that Ontario Hydro could accommodate Brown in that respect. Phair then told Laut that Zimmerman, the business agent for Local 736 of the union, would hand-deliver minutes of settlement to the project the following day. Phair said he thought a settlement had been reached by this point.

13. After the last of his conversations with Laut, Phair told Brown to meet him and Zimmerman at the Constellation Hotel the following morning to execute minutes of settlement. When Brown met with Phair at the Constellation Hotel the following morning, he told Phair that he had changed his mind. He asked whether he could return to work the following Monday but still process the grievance with respect to back pay. Phair told him he could not, pointing out that getting his job back was part of an overall settlement which required him to give up the possibility of retroactive pay and accept the deemed August 1, 1981 seniority date. Brown expressed concern that this seniority would not be sufficient to prevent Ontario Hydro from trying to get rid of him again. Despite Phair's assurances that this seniority seemed adequate to survive the next round of lay-offs, Brown persisted in his refusal to sign the minutes of settlement. He told Phair that he wanted to pursue the matter on his own. Phair then

told Brown he was going to close the union file on these grievances. He told Brown he felt the union had secured the best settlement they could possibly get for him, and if Brown wanted to go on with it on his own that was his prerogative. He then contacted Laut and told him Brown had not signed and that the union would not proceed with the grievances.

14. Phair made it clear during cross-examination that the delay between completion of his telephone conversations with Laut and presentation of the minutes of settlement to Brown was not for the purpose of affording Brown an opportunity to consider the settlement, but merely resulted from the logistics of having the minutes typed up. Phair also made it clear that he felt the contents of the minutes of settlement shown to Mr. Brown on August 24, 1982 accurately reflected the terms settled by Phair and Laut during their telephone conversations the previous day and agreed to that day by Brown.

15. In his evidence, the grievor confirmed he had met with Phair and Zimmerman first at the offices of the union's solicitors, and again the following day at the Constellation Hotel. He acknowledged that the terms of settlement discussed between Phair and Laut had been discussed with him, and that at the first meeting he had "verbally agreed" to take the settlement. He said that he changed his mind after leaving the meeting. He became concerned about the seniority provided for in the settlement. He did not think it was enough, and worried that the company might not honour it. When he met with Phair and Zimmerman the following day, he was shown minutes of settlement which he conceded reflected the terms to which he had "verbally agreed" the day before. He refused to sign the minutes of settlement because of his change of mind.

16. Mr. Brown confirmed having received a letter from Mr. Phair dated August 26, 1982 which read, in part, as follows:

"As you will undoubtedly recall, you and I and Mike Zimmerman, Business Agent of Local 736, met in the offices of our solicitors on Monday, August 23, 1982 with respect to these matters. At that time, we discussed Ontario Hydro's offer to settle the grievances on the basis of your immediate reinstatement to the Bruce Generating Station with a seniority date of August 4, 1981. This appeared to be Ontario Hydro's final position and represented an increase of their last offer to settle, which was reinstatement with a seniority date of only November 1, 1981. The greater seniority date of August 1, 1981, would virtually have assured you of escaping the expected fall lay off at the Bruce Generating Station. We advised you that we thought it was an excellent settlement in the circumstances and you, after some deliberation, advised us that you would accept the settlement. Accordingly, we immediately notified the Personnel Manager at the Bruce Generating Station that the Union accepted the offer and that the grievances would be settled on that basis. In fact, as an accommodation to you Ontario Hydro even agreed that your first day of work would not be until Monday, August 30, 1982.

However, on Tuesday, August 24, 1982, when I and Mike Zimmerman met you with written Minutes of Settlement, you repudiated your earlier agreement to settle the matter on this basis and refused to sign the Minutes of Settlement. Accordingly, as I advised you then and as I advised

you in the course of the meeting in our solicitors office, the Union cannot process your grievance any further."

17. The final witness on behalf of the grievor was Michael Zimmerman, the Assistant Business Agent for Local 736 of the Ironworkers. Zimmerman confirmed that the proposed seniority date which had been the subject of discussions was August 1, 1981. Another date which had been the subject of earlier of discussion was November 1, 1981. These discussions had been triggered by the suggestions of the Labour Relations Officer, and had revolved around giving Brown a seniority date as of "the first of" some month. On being shown the minutes of settlement, which designated August 4, 1981 as Brown's new seniority date, Zimmerman noted that August 1, 1981 was a Saturday and August 4th was the Tuesday following the Civic holiday Monday. He said he had not noticed the difference between August 1st and August 4th in the minutes of settlement and did not remember anyone else commenting on the difference at the meeting of August 24, 1982, at the Constellation Hotel.

18. Counsel for the respondent employer argues that the evidence discloses an oral settlement of the matters raised in the grievances referred to this Board. He argues that this precludes the Board from proceeding with the referral.

19. Counsel for the grievor argues that the matter was not settled. He asks us to find that the conversations between Laut and Phair contemplated as pre-conditions to a final settlement both the grievor's agreement with its terms and the execution by all parties, including the grievor, of a document reflecting those terms. He asks us to find that, from the grievor's point of view, there was no settlement until he signed the document. He argues that there was at least one issue, seniority, which had not been resolved to the grievor's satisfaction and therefore could not be said to have been settled. He points out that while the oral discussions provided for a deemed seniority date of August 1, 1981, the minutes of settlement prepared and placed before Mr. Brown referred to August 4, 1981. He argued that we should take into account that the reasons for the grievor's change of heart might be good ones. Finally, counsel for the grievor asks us to weigh the costs to the grievor of having "the rug pulled out from under him" against the prejudice to the company if the grievances are now arbitrated on their merits.

20. On the evidence before us we have no difficulty finding that on Monday, August 23, 1982, the trade union and the employer concluded an oral settlement agreement, the terms of which were that the grievor could return to work August 30, 1982 without back pay and with seniority calculated from "the first of" August, 1981. We find that the grievor accepted these terms, and that his acceptance was communicated to his employer in the course of finalizing the details of the oral settlement. Accordingly, it is not necessary for us to determine whether the grievor's concurrence was or was not a pre-condition to settlement at any point prior to the last of the conversations between Phair and Laut.

21. As to the reference to August 4th in the minutes of settlement prepared by the union, we find the union's use of that date consistent with its apparent understanding that August 4th was effectively "the first of" August, 1981 for seniority purposes. If that was not Brown's understanding as well, we would have expected him to say so on August 24, 1982 or in his evidence before this Board. His testimony that the memorandum did reflect the terms to which he had agreed persuades us that the difference between the two dates is inconsequential. In any event, if this understanding was mistaken, if August 4th was not "the first of the month"

for seniority purposes, then this was a minor and unilateral mistake by the union which in no way detracts from the clear agreement of the parties that the grievor's seniority would date from "the first of" August, 1981.

22. We also find that on August 23, 1982, after the terms of the agreement had been settled orally, the parties to the agreement expected that those terms would be reduced to writing in a document to be executed by the union and delivered to the employer. There is no evidence that the employer expected the grievor's signature to appear on the anticipated document. Whether the grievor's signature was expected or required, however, the fact remains that the document was never executed by the union or, indeed, by the employer. What effect does this have on the arbitrability of the grievances which were the subject matter of the oral settlement?

23. Nothing in the collective agreement, the *Labour Relations Act* or the common law requires that the terms of settlement of a grievance arising under a collective agreement be reduced to writing before that settlement can be enforced.

24. Although the settlement of a grievance need not be made or evidenced in writing, it very often is. That was certainly the experience of the trade union and employer witnesses in this matter. It is not hard to see why that would be so. A written memorandum evidencing the agreement of the parties greatly facilitates the proof of, and thereby reduces the potential for dispute over, the agreement's existence or terms.

25. Of course, not every written agreement is a mere memorandum evidencing the terms of an existing oral agreement. In complex matters, negotiations may proceed orally until the parties feel they have reached agreement in principle, leaving the details to be worked out thereafter in the process of drafting a written agreement. To the extent the anticipated written agreement is required or expected to contain terms or resolve points not finalized during oral negotiations, it can fairly be said that there is no agreement until the required document has been finalized and executed. Delivery and execution of the anticipated document is, in those circumstances, a pre-condition to the existence of a binding agreement. In each case where a written agreement is contemplated, it is "a question of construction, whether the parties intended that the terms agreed should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail." (*Winn v. Ball*, (1877) 7 Ch. D. 29 per Jessel, M.R. at p. 32; see also *Re Dominion Stores Limited and United Trust Co. et al*, (1974) 42 D.L.R. (3d) 523 (Ont. H.C.) at pp. 527 to 529; aff'd 52 D.L.R. (3d) 327 (Ont. C.A.); aff'd 71 D.L.R. (3d) 72 (S.C.C.)).

26. The purpose of any grievance arbitration process is to secure prompt, final and binding settlement of disputes involving the application and interpretation of collective agreements, in the interest of industrial peace (see *Heustis v. New Brunswick Electric Power Commission*, [1975] 2 S.C.R. 768 per Dickson, J. at 781). The pre-arbitration grievance procedures typically provided for in collective agreements afford the parties an opportunity to resolve disputes promptly, informally and without the expense of arbitration. The requirement that such procedures be exhausted before proceeding to arbitration enhances the prospects of settlement. Section 124(2) serves a similar purpose by providing for the appointment of a Labour Relations Officer to endeavor to effect a settlement before the Board conducts a hearing. Our labour relations system relies on and values the ability to settle disputes. This Board is loath to adopt any approach which might limit or impair the settlement process or discourage its

use: *Crown Electric*, [1978] OLRB Rep. Apr. 344; *Bot Construction (Canada) Limited*, [1982] OLRB Rep. Dec. 1811. It is important that boards of arbitration not impose unnecessary technicalities or limitations on the settlement process, because to do so would undermine the finality of settlements parties feel they have achieved in good faith. (See *Ford Motor Company of Canada Ltd.*, (1952) 3 L.A.C. 1159 (Lang) at 1161; *City of Sudbury*, (1965) 15 L.A.C. 403 (Reville); *Re Continental Can Co. of Canada Ltd.*, (1975) 10 L.A.C. 35 (Weatherill).)

27. The question of the efficacy of an oral settlement agreement arose in *Re Bilt-Rite Upholstering Co. Ltd.*, (1980) 24 L.A.C. (2d) 428 (Rayner). In that case an arbitration hearing had been adjourned pending settlement discussions. When the hearing resumed, company counsel took the position that the matter had been settled in the meantime. Union counsel took the position that the matter had not been settled. Both counsel agreed that their settlement discussions had reached a point at which they had reached oral agreement on the terms of a settlement which had been reflected in an unexecuted handwritten draft agreement which both counsel had pronounced satisfactory. The handwritten draft had been typed up and the typed version circulated for execution. At that point, union counsel had learned of the possibility of retroactive legislation which might make taxable the payment of damages contemplated by the settlement. That had led the union to refuse to sign the minutes of settlement. The union then argued that the settlement had to be in writing and signed to be binding, by analogy with collective agreements. It also argued that the parties' intention had been that there would be no binding settlement until all documentation was complete. The board of arbitration in that case concluded, at p. 430-431:

The Board is of the opinion that the parties reached settlement on all substantive matters. There were not matters left in dispute after the parties had reached their settlement. It is true that the settlement contemplated the reduction of the settlement to writing and signing by both parties. However, in our view, this was a mere procedural matter and was not an essential part of the settlement. If the union had suggested that there was [sic] some substantive terms that had not been covered by the settlement, the matter would be quite different. No suggestion was forthcoming.

The Board is also of the opinion that the analogy that union counsel attempted to draw between the settlement and the requirement that a collective agreement be in writing is not persuasive. There is no doubt that the grievor approved the settlement at the conclusion of the hearing. Thence was ratification, if such was necessary at that time. Obviously, a collective agreement is far different in scope and impact from minutes of settlement. In the first place, the collective agreement covers a multitude of employees and is drawn to cover many possible future situations and potential areas of conflict. A collective agreement must also be ratified by members of the bargaining unit. All of these reasons indicate the purpose behind the provisions of the *Ontario Labour Relations Act*, R.S.O. 1970, c. 232, which require an agreement to be in writing. These reasons do not pertain to a settlement.

Moreover, one cannot conclude that the settlement should be vitiated simply because of some potential impending legislation that may or may not be enacted and may or may not be retroactive.

In essence, the parties reached agreement on all terms and should be held to that agreement.

Accordingly, the board concludes that the parties reached agreement and the grievance is no longer arbitrable.

28. We come to the same conclusions in this case as did the board of arbitration in *Bilt-Rite*. There were no matters left in dispute after Laut and Phair had reached their settlement. Ratification, if it was necessary, was provided by the grievor. We find that the creation and signing of a memorandum contemplated by Messrs. Laut and Phair was a procedural matter and not an essential part of the settlement they reached.

29. The grievances referred to the Board in these proceedings were settled in August of 1982. They are, accordingly, no longer arbitrable, and they are hereby dismissed.

30. In the result, it is unnecessary for us to review the evidence and argument we heard on the question whether the grievor's delay should result in a dismissal of these grievances. It is also unnecessary to hear evidence with respect to the merits of the grievances. Accordingly, the hearing dates of November 22 and 23 set aside for that purpose are hereby cancelled.

1506-83-R M. A. Sample, Applicant, v. Teamsters Union Local 91, Respondent, v. Ottawa Commercial Realities Limited, Intervener, v. Group of Employees, Objectors

Petition - Practice and Procedure - Termination - Whether allegations of employer wrong-doing with relation to petition delayed to cause Board not to entertain - Whether familial relationship between applicant and member of management sufficient to cast doubt on voluntariness of petition - Whether member of management directed filing of termination application

BEFORE: Owen V. Gray, Vice-Chairman and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Margaret A. Sample on her own behalf; Ken Petryshen and Rick Kelly for the respondent; Joe Carrier and Dale Worrell for the intervener; no one appearing for the objectors.*

DECISION OF THE BOARD; November 28, 1983

1. This is an application brought pursuant to section 57(2) of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent trade union. Subsection (3) of section 57 reads as follows:

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

2. The intervener filed a list of employees in the bargaining unit represented by the respondent, which indicated 10 employees in that bargaining unit as of the date of this application. With her application, the applicant filed a statement of desire signed by seven of those 10 employees, signifying that they no longer wish to be represented by the respondent trade union. The respondent trade union filed three documents purporting to evidence the desire of a total of five employees that they continue to be represented by the respondent. These documents were filed by registered mail posted on October 17, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j), to be the time for determining whether a number of employees who have voluntarily signified in writing that they longer wish to be represented by the respondent trade union. Only two of the signatures on the counter-petition filed by the respondent correspond with signatures on the petition filed with the application. The written significations of those who have not executed a counter-petition are sufficient in number to cause the Board to order a representation vote if those five people are found to have voluntarily signed the petition.

3. The Board undertook its usual inquiry with respect to the voluntariness of the petition. The applicant testified under oath that she was an employee within the bargaining unit represented by the respondent. She said the question of the union had been batted around by the employees for a considerable period of time. The general consensus, so far as she was concerned, was that the dues were too high, they did not see much of the union and articles in the newspaper about employers shutting down in the face of excessive union demands led them to wonder what might happen to them. A co-worker's complaint one day about all the deductions on her pay cheque finally led the applicant to contact the Ministry of Labour to find out what was involved in an application to terminate the union. She said it was explained to her that there was a time frame within which she could make the application. She had to have two telephone conversations with them to satisfy herself exactly what that time frame was. She asked for and was sent the necessary forms, along with some books which she read and did not really understand very well. She read the union contract to see when it expired. When she got the forms, she completed them and prepared the petition on her own typewriter. Only her daughter was present when she did that.

4. Mrs. Sample also gave evidence with respect to the circulation of the petition and its ultimate delivery to the Board. The petition never left her sight. She obtained the signatures all on one day, at various points in and about the buildings where she and the other signatories work, prior to the commencement of her own work shift. No management personnel were present or within sight when any of the signatures was obtained. By and large she caught the other employees as they were going off shift or before they went on shift.

5. There was some conflict in the evidence over the precise time and place at which

the signature of Mr. Roy, the union's sole witness, was obtained. He says it was at least half an hour before his quitting time. The applicant says that cannot be so, and that she obtained his signature as he was coming off shift. Having seen and heard both the applicant and Mr. Roy, we are satisfied that the applicant has a better grasp of the time frames involved. Even if Mr. Roy is right, we do not believe the timing of his signature would have affected its voluntariness. It would have been clear to Mr. Roy that Mrs. Sample was not collecting the signatures during her own working hours and, but for the matters to be discussed later in this decision, he would have had no reason to suppose she had the approval of management to interrupt his work.

6. The respondent trade union attacks the voluntariness of the petition. The basis of its attack was set out in a letter to the Board dated October 27, 1983, the body of which reads as follows:

"It is the position of the Respondent that the petition filed in the above matter does not represent a voluntary expression of those employees who signed it. As well, it is the position of the Respondent that management was involved in the origination and circulation of the petition. The particulars which the Respondent intends to rely upon are set out below:

1. The petition was circulated during working hours and with the knowledge of management.
2. For a period of three weeks prior to the termination application, the petitioner, a sister of the supervisor Bob McIntyre, discussed the question of the Union with most of the employees. At least on one occasion the subject of the Union was discussed by the petitioner and by McIntyre in the presence of other employees. In these discussions, the petitioner and McIntyre were attempting to convince the employees that they should no longer support the bargaining agent."

This application was filed September 26, 1983. The respondent filed a Reply dated October 14, 1983. That Reply contains no allegation of improper conduct. The Board's hearing in this matter was conducted on October 31, 1983. At the outset of the hearing, counsel for the intervenor employer objected to the lack of particularity in the letter of October 27 and the delay, which counsel described as inordinate, in its delivery. We were urged to exercise our discretion under Rule 72 of the Board's Rules of Practice and refuse to permit evidence with respect to the allegations in the letter. In response to this objection, counsel for the respondent trade union said the delay was due to the difficulty the trade union had experienced in breaking through the sense of uneasiness which prevailed in the workplace as a result of the application. He said the trade union had only recently discovered the allegations set out in the letter. We were prepared to take counsel at his word. On the basis of those and other representations, the Board gave the following oral ruling:

"The Intervener invokes Rule 72 with respect to allegations raised by the respondent by letter dated October 27, 1983.

We are satisfied that the matters alleged do concern improper or irregular conduct as contemplated by Rule 72. Application of the Rule is

not limited to proceedings in which a remedy is sought against the person alleged to have engaged in the impugned conduct.

We are also satisfied that the matters referred to in the letter could have been raised during cross-examination of the applicant even if there had been no prior notice. This is because the matters raised go to the question whether the petition is voluntary.

For the same reason, we would not refuse to hear evidence with respect to the matters charged. Without ruling on whether the circumstances fall within subsection (2) or subsection (3) of Rule 72, we are satisfied the only relief we would grant the party prejudiced would be an adjournment.

That question need not be dealt with unless the union proposes to call evidence to supplement the examinations of the applicant. We will therefore reserve any question of adjournment until the applicant's case has closed."

Thereafter, Mrs. Sample gave her evidence, and then the union called Luc Roy to give evidence with respect to the allegations set out in its letter. Before reviewing Mr. Roy's evidence in support of those allegations, we think it important to note that in his testimony Roy swore that he had first told his story to Rick Kelly at a union meeting on September 27, 1983. Rick Kelly was the union representative present at the Board's hearing in this matter. We are unable to characterize that meeting, if it occurred on September 27th, as a *recent* event in relation to the trade union's letter to the Board of October 27th, 1983. Of the number of conclusions which might flow from a balancing of Roy's evidence and the earlier representations of respondent's counsel, we have concluded that Roy must have been mistaken about the date on which he first told the Union the story which led to its letter of October 27, 1983. This is consistent with our other observations of Roy as a witness. If we had come to any conclusion inconsistent with the representations of respondent's counsel on the question of delay, we would have reconsidered our ruling on the intervenor's objection. We might have concluded that allegations of wrongdoing of which the union was first aware September 27th would not have been entertained when first raised by letter dated October 27, 1983, having regard to the reasoning in *Cable Tech Wire Company Limited*, [1978] OLRB Rep. 496. We would, in that case, have disregarded Mr. Roy's evidence entirely in arriving at our decision in this case.

7. Roy testified to a conversation which he said took place during the lunch hour about three weeks before this application was filed. It is common ground that some of the employees eat lunch in a particular area of the one of the two buildings they are employed to maintain. It is also common ground that the applicant's brother, Robert McIntyre, is the immediate supervisor of those employees, and that he also eats his lunch in that location. In his examination-in-chief, Roy testified that on the occasion in question Mr. McIntyre had initiated a discussion about the trade union, during which he said that the employees did not have any sick leaves or union cards. Roy claimed that McIntyre and the applicant then proceeded to discuss these issues in front of the other employees, who just sat and listened. During this discussion, he alleged, McIntyre pointed out that the end of the year was approaching, and that this would be a good time to get rid of the union if they wanted to do so. In cross-examination, Roy conceded he did not know who had initiated the discussion about the trade

union. He further conceded, as he had in his examination-in-chief, that everyone present had been complaining about the amount of union dues they were paying. It was put to Roy that all Mr. McIntyre was doing was commenting on the complaints that had been made by the employees, and that McIntyre's response had been that they should look to the union and not to him. Roy's response to this proposition was "Yeah, but he gave us a good hint when to do it if we want to get rid of it." Reminded he had earlier testified that McIntyre had not told them to get rid of the union, Roy explained "He didn't push us to do it. He said 'if' – that's not telling us to do it."

8. In her earlier testimony, the applicant had quite freely conceded that McIntyre was her brother. She said there had been no secret about that, and that the employees would be aware of the relationship. She also freely admitted she had obtained the job through her brother, but explained that they had made a "pact" that they would not discuss work outside of work and that they would keep their working relationship quite separate from their personal lives. Mrs. Sample also said that employee concerns about the union had been kicked around quite freely for a long period of time in many discussions, and she volunteered that McIntyre may have been present during some of those discussions. However, she said his participation in such discussions was limited to his pointing out that the union was none of his business, that he did not belong and that it was their problem, not his. She testified he never said whether they should or should not have a union. She denied that a conversation had taken place in the way Roy described. She said the question of the timing of the application was one she had sorted out herself as a result of reading the union contract and speaking by telephone twice to persons at the Ministry of Labour.

9. Having seen and heard them both, we prefer the evidence of Mrs. Sample where it differs from that of Mr. Roy. Roy was often hazy about dates, having to be led back to events two or three times by the union's counsel before he got a date right. Many of the questions asked of him in examination-in-chief were in the form of leading alternatives, to which he consistently responding by selecting the second of the alternatives offered. Mrs. Sample, on the other hand, was direct and consistent, both in presenting her evidence and in cross-examination.

10. Section 57(3) of the *Labour Relations Act* requires that we satisfy ourselves that the written statement of desire filed in support of a termination application represents the voluntary signification of the wishes of the employees who signed it. The approach taken to voluntariness is explained by the Board in *Grove Park Lodge*, [1980] OLRB Rep. Feb. 235 at p. 240 in the following terms:

The Board has always been sensitive to the particular vulnerability of employees arising out of the employer-employee relationship. As stated in the *Pigott Motors (1961) Ltd.* case, 62 CLLC ¶16,264:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trades unions of their own choice and to bargain collectively

with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories.

and in the *Peel Block Co. Ltd.* case, 63 CLLC ¶16, 227:

It is a function and duty of this Board to be vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent.

See also *CCH Canadian Limited* [1975] OLRB Rep. Jan. 19, which involved an application for termination of bargaining rights.

17. The Board has before it, in the present case, a cogently-worded statement of desire signed by almost the full complement of the bargaining unit. The Board must still be satisfied, however, that the motivation behind such a statement was of a truly voluntary nature; that is, as the above cases indicate, that the employees are not simply identifying themselves with the choice of their employer, out of fear of antagonizing their employer, or fear of reprisal, or for whatever reason. This is a fundamental duty which the Board owes to the employees themselves, and is made a pre-condition under section 49(3) of *The Labour Relations Act* to its power to direct the holding of a representation vote.

18. As the *Pigott Motors* case, *supra*, makes clear, so vulnerable are employees to employer influence that the influence need not even be created by employer design. The Board in a long line of cases has refused to accept as voluntary a statement of opposition to a trade union signed in circumstances where the employees could reasonably believe that their failure to sign would come to the attention of management. In the *Morgan Adhesives of Canada Limited* case, [1975] OLRB Rep. Nov. 813, for example, the Board stated at paragraphs 30 and 31:

30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board which would support such a finding.

31. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management.

19. In carrying out its statutory duty, the Board is at the same time conscious that it must not be overprotective of employees' interests to the point where its evidentiary requirements become an unwitting trap for those very employees trying to express themselves. At all times a balance must be struck.

11. The Board has had occasion in several cases to consider whether the existence of a familial relationship between the applicant and a member of management is sufficient to cast doubt on the voluntariness of a statement of desire. In *Otto's Deli* [1980] OLRB Rep. Nov. 1673, the Board had this to say:

20. We do not think that we should readily draw inferences from the mere existence of a family relationship. In some circumstances, relatives may reasonably be perceived as having a special relationship with the employer which could influence an employee's choice with respect to trade union representation, but we do not think that this is always the case, nor are we prepared to automatically assume that the existence of a family relationship necessarily evidences a community of interest with the employer. It may be that there is a presumption tending in that direction but we are all aware that family relationships do not always exhibit the solidarity which counsel suggests. The involvement of family members is not irrelevant, but it is not the only factor to be considered especially where, as here, the inferences to be drawn from it were unclear. Of equal significance in our view is the general atmosphere prevailing at the work place, and the impact this would likely have on employee perceptions.

In *International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690, the Board found a petition voluntary notwithstanding that the applicant employee was the wife of one of the co-owners of the employer business and that four others of the six employees in the bargaining unit were related to one or the other of those owners. In *Jean Marc Joannis*, [1983] OLRB Rep. Jan. 92, the applicant was the son of the owner of the employer business. Significantly, he acted as manager of the store where the bargaining unit employees worked when the regular store manager had his days off or was on vacation. The applicant in that case conceded that employees could view him as a part of management. In the course of obtaining signatures on his petition, he had commented about his father's methods of doing business, and had spoken of the possibility of a strike during the then consent of negotiations. The Board in the circumstances of that case concluded that the applicant could reasonably have been regarded by his fellow employees as an arm or agent of his father acting for his father's interests in circulating the petition.

12. In this case, we are satisfied that her fellow employees would not regard Mrs. Sample as a mere arm or agent of her brother. Mr. Roy commented that in the conversations he claimed had taken place between Mrs. Sample and her brother she had agreed with some things

he said and disagreed with others. Having seen and heard Mrs. Sample ourselves, we are satisfied she presents herself as a force independent of her brother. We also take into account that her brother is at the lowest level of "management", that there is no evidence of a concurrent anti-union campaign by management and that Mr. McIntyre himself demonstrated indifference to the presence or the absence of a union. Finally, we take into account that even on Mr. Roy's evidence of the comments of Mr. McIntyre, he was not perceived by the employees as directing them to get rid of the union.

13. The Board therefore directs that a representation vote be taken of the employees of the Ottawa Commercial Realities Limited. Those eligible to vote are all employees of Ottawa Commercial Realities Limited working at Ottawa, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty (20) hours per week, and students employed during the school vacation period on the date of this decision who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

14. Voters will be asked to indicate whether they wish to be represented by the respondent in their employment relations with Ottawa Commercial Realities Limited.

15. The matter is referred to the Registrar.

1081-83-R General Workers' Union, Local 1030 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Rolland Duquette Construction**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener

Bargaining Unit - Certification - Construction Industry - Carpenters, Local 1030 seeking unit of construction labourers in Board area in all sectors other than ICI - Board decision in *Manacon* holding local 1030 to be ABA of a designated EBA and required to apply in ICI sector under s.144(1) - Whether s.144(3) restricting locals right to apply for unit outside ICI - s.146 not intended to restrict right of unions to enter into agreements outside ICI sector

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. A. Ronson and P. J. O'Keeffe.

APPEARANCES: *Douglas J. Wray and Frank Manoni for the applicant; no one appearing for the respondent; B. Fishbein and A. Roy for the intervener.*

DECISION OF THE BOARD; November 8, 1983

1. These proceedings commenced with the filing of an application for certification by General Workers' Union, Local 1030 of the United Brotherhood of Carpenters and Joiners of America ("Carpenters Local 1030"). The application was filed pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The status of Carpenters Local 1030 was dealt with at some length by the Board

in its decisions in *Manacon Construction Limited* [1983] OLRB Rep. Mar. 407 and a second, decision dated July 13, 1983 reported at [1983] OLRB Rep. July 1104. Local 1030 was chartered by the United Brotherhood of Carpenters and Joiners of America to represent "helpers, including labourers and other construction workers, excluding carpenters and carpenters' apprentices who are employed in the industrial, commercial and institutional sector of the construction industry". In the *Manacon* case, the local had applied to be certified to represent, amongst others, a number of construction labourers working in the industrial, commercial and institutional sector of the construction industry (the "ICI sector"). In that case, the Board concluded that the local was an affiliated bargaining agent of a designated employee bargaining agency (namely, the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America) and as such was required to bring all applications for certification that relate to the ICI sector under section 144(1) of the Act, which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 117 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

3. In the *Manacon* case, the Board concluded that the application by Carpenters Local 1030 could not succeed under section 144(1) because the unit it was seeking to represent would not constitute an appropriate bargaining unit under that subsection. The Board also reasoned that the local would be prevented by section 146(2) from concluding a lawful collective agreement covering construction labourers employed in the ICI sector.

4. In filing the instant application, Carpenters Local 1030 requested that it be certified to represent a unit of construction labourers in the employ of the respondent in Board Area #15 (the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott & Russell) for all sectors of the construction industry, excluding the ICI sector. It is the position of the local that it is entitled to bring such an application pursuant to section 144(3) of the Act, which provides as follows:

"Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining."

5. The respondent employer made no filings in response to the application for certification. However, prior to the terminal date fixed for the application, Labourers' International Union of North America, Local 527 ('Labourers Local 527') intervened in the proceedings by way of an application for certification by intervener. The Labourers Local is seeking to be certified to represent a unit of construction labourers in the employ of the respondent in the ICI sector in the Province of Ontario, and in all other sectors in Board Area #15. Such a unit would appear to be a unit for which Local 527 is entitled to bring an application for certification pursuant to section 144(1).

6. The Board scheduled a hearing into the two applications. The respondent did not attend at the hearing, although both trade unions were represented by counsel. At the hearing, both unions agreed that on the date of the filing of the application by Carpenters Local 1030 (which pursuant to section 103(3), the Board will treat as the application date for *both* applications) the respondent was engaged on two projects, both of them within Board Area #15. One of the projects involved the construction of a rapid transit line over-pass in the City of Ottawa. Both unions acknowledge that this project did not come within the ICI sector. The other project involved the construction of a community centre in Vernon. Both unions agree that this project was within the ICI sector.

7. Carpenters Local 1030 does not dispute the right of Labourers Local 527 to bring its application for certification under section 144(1). However, Local 527 submits that Carpenters Local 1030 is not entitled to bring its application under section 144(3). It is the contention of Labourers Local 527 that the provision in section 144(3) permitting a trade union represented by an employee bargaining agency to bring an application for certification in relation "to a unit of employees in all sectors of a geographic area other than the industrial, commercial and institutional sector" impliedly refers to a unit described in terms of the same classes of employees that the union is entitled to bargain for in the ICI sector. Local 527 contends that any other approach would be destructive of stability in construction industry bargaining. In this regard, the local relies on certain comments of the Board in the *Manacon* case, wherein the Board indicated that for it to certify Labourers Local 1030 for construction labourers employed in the ICI sector would be inconsistent with the legislative objective of stabilizing the collective bargaining process in the ICI sector. It is the position of Labourers Local 527 that the reasoning behind those comments is also applicable to collective bargaining in the non-ICI sectors.

8. On a review of the language of section 144(3), we are satisfied that the subsection does not restrict Carpenters Local 1030 from bringing an application for certification for a bargaining unit which encompasses construction labourers employed outside of the ICI sector. In our view, had it been the intent of the Legislature to apply the same restrictions with respect to non-ICI bargaining units, as it did for units that relate to the ICI sector, it would have done so through express language in the Act, and since it has not done so, it would be inappropriate for the Board to imply any such restrictions. In this regard, we would note that whereas there exists a legislatively mandated scheme of what might loosely be termed as single-trade multi-employer bargaining in the ICI sector, no such similar mandated scheme exists with respect to the other sectors of the construction industry. Accordingly, the certification of unions "across craft lines" in the non-ICI sectors of the construction industry will not likely have the same type of disruptive effect that the Board referred to in the *Manacon* case.

9. As an alternative argument, Labourers Local 527 contends that pursuant to section

146(2) of the Act, Carpenters Local 1030 is prohibited from entering into a collective agreement covering non-ICI construction labourers, since such an agreement would amount to an agreement other than a provincial agreement. Accordingly, contends Local 527, it makes no sense to certify Carpenters Local 1030 for the requested bargaining unit. Section 146 subsections (1) and (2) provide as follows:

“146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.”

10. We view the purpose of section 146 as being to ensure that unions covered by the scheme of provincial bargaining do not enter into any arrangement or collective agreement with respect to employees in the ICI sector that is other than a “provincial agreement” as that term is defined in section 137(1)(e). We do not view the section as restricting the right of unions to enter into collective agreements outside the ICI sector. Indeed, if one were to accept the interpretation contended for by Labourers Local 527, it would logically be improper for any local of any of the building trades unions to enter into separate collective agreements for the non-ICI sectors of the construction industry. Had the Legislature intended such a drastic result, we have no doubt that it would have used language much clearer than that contained in section 146. Accordingly, we do not view section 146 as a bar to this application.

11. Having regard to the above, we are satisfied that Carpenters Local 1030 is entitled to bring an application for certification that relates to construction labourers employed outside of the ICI sector. This is *not* to say that the Local is as of right entitled to be certified for a unit described in terms of construction labourers, for it is not. In our view, pursuant to section 6(1) of the Act, the appropriate bargaining unit is one that encompasses *all* unrepresented trades in the employ of the respondent on the application date. As it happens, the only trades employed by the respondent on the application date were carpenters and construction labourers, and the carpenters were already represented by another local of the United Brotherhood of Carpenters and Joiners of America. This being so, the only unrepresented employees of the respondent were construction labourers. Accordingly, in the circumstances of this case, a unit described in terms of construction labourers would be appropriate.

12. Having regard to the above, we are satisfied that we have before us two proper applications for certification. One is an application brought by Carpenters Local 1030 under section 144(3) for construction labourers employed in Board Area #15 exclusive of those in the ICI sector. The second is an application by Labourers Local 527 brought under section

144(1) for construction labourers in the ICI sector on a province-wide basis as well as construction labourers in all other sectors in Board Area #15. Having regard to the material before us, we are satisfied that each of the unions has filed timely evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit that it is seeking to represent.

13. In these circumstances, the Board deems it appropriate to conduct a representation vote amongst the employees in the following *voting constituency*, namely:

all construction labourers in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.

The description of the final bargaining unit (or units) must, in the particular circumstances of this case, await the results of the representation vote.

14. Those eligible to vote are all employees of the respondent in the voting constituency on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

15. Voters will be asked to indicate whether they desire to be represented by General Workers' Union, Local 1030 of the United Brotherhood of Carpenters and Joiners of America or by Labourers' International Union of North America, Local 527 in their employment relations with Rolland Duquette Construction.

16. The matter is referred to the Registrar.

0065-83-U The Board of Education for the Borough of Scarborough, Complainant,
v. The Ontario Secondary School Teachers' Federation and others listed on Schedule
"A", Respondents

Employee – Strike – Trade Union – Unfair Labour Practice – Whether OSSTF meeting definition of "Trade Union" – Whether teachers accepting future appointment "employees" – Board not adopting common law distinction between contracts of hiring and of employment – Mass resignations in concert and not individual quits – Constituting unlawful strike – Union support and encouragement breach of s.74

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. D. Bell and L. Collins.

APPEARANCES: Barry W. Earle, Q.C., John W. Woon and F. G. Plue for the complainant; Maurice A. Green, M. Richardson and M. Buchanan for The Ontario Secondary School Teachers' Federation; David Bloom for Patricia Thompson; H. Goldblatt, J. Farrell and A. Andoniadis for Andy Andoniadis.

DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; November 8, 1983

1. This is a complaint under sections 89 and 92 of the *Labour Relations Act* arising from what the complainant contends was an unlawful strike. In the complainant's submission, the unlawful strike occurred when a number of summer-school principals, vice-principals and curriculum resource teachers resigned, *en masse*, from positions to which they had been appointed and which they had earlier accepted.

2. When this complaint was originally filed, the complainant sought relief against a number of named principals, vice-principals, curriculum resource teachers, and classroom teachers, as well as against certain teacher organizations and their officials. However, following the release of the decision of the Board in a similar case involving the Ottawa Board of Education (Board File No. 2658-82-U), the complainant withdrew against the named classroom teachers; and having heard some of the evidence it also withdrew against Ms. Mildred Fortune, one of the curriculum resource teachers. We are left then, with the allegation that what is described as a "mass resignation" by certain principals, vice-principals and curriculum resource teachers, constitutes an unlawful strike within the meaning of the *Labour Relations Act*. It is further alleged that this unlawful strike was encouraged, procured and supported by the officers of the Ontario Secondary School Teachers' Federation and its District 16 (Scarborough).

3. The arguments of the parties and the relief sought will be set out in more detail below. It will be convenient to begin by reviewing the circumstances giving rise to the present proceeding. For ease of reference the complainant, the Board of Education for the Borough of Scarborough will be referred to as "the employer" or the "Scarborough Board"; the Ontario Secondary School Teachers' Federation will be referred to as the "OSSTF"; District 16 (Scarborough) of the Ontario Secondary School Teachers' Federation will be referred to simply as "District 16", and the principals, vice-principals and curriculum resource teachers named as individual respondents will frequently be referred to, collectively, as "the resignees". All but one of the resignees are members of OSSTF and its District 16.

4. The Board notes the agreement of the parties that, for the purposes of this proceeding, the principals, vice-principals and curriculum resource teachers are “employees” within the meaning of the *Labour Relations Act*. We record this stipulation because, having heard the evidence, there is an argument to be made that the principals and vice-principals exercise “managerial functions” within the meaning of section 1(3)(b) of the Act – whatever their status may be under the *School Boards and Teachers Collective Negotiations Act*. The Board also notes the following agreement of the parties with respect to the evidence adduced in this matter:

AGREEMENT AS TO EVIDENCE

For the purposes of this application and the submissions to be advanced on behalf of the applicant and the respondents, the parties, by their counsel, hereby agree as follows:

1. The evidence of David Bergson, Ron Hinz, Peter Baker and John Saso will be regarded as generally representative of the evidence that would be given by the other principals and vice-principals referred to in paragraphs 15 and 16 of the within application were they called to give evidence, with the exception of Jack Hanna and Patricia Thompson.
2. As to the evidence of what was said at the meeting on March 8, 1983, by the respondent Andy Andoniadis regarding what would happen if the applicant did not accept the resignations that had been submitted, it is agreed that if the other principals and vice-principals at that meeting were called to give evidence, their evidence would be similar to the evidence of the respondents Bergson, Hinz and Saso.
5. The employer and District 16 are parties to a collective bargaining relationship and a collective agreement established pursuant to the provisions of the *School Boards and Teachers Collective Negotiations Act*. That collective agreement is primarily concerned with the terms and conditions of employment of teachers employed during the regular day school programme, which runs from early September until approximately the end of May. The *School Boards and Teachers Collective Negotiations Act* does not apply to the employer’s summer programmes, or to the employment relationships of teachers engaged to teach or administer those programmes. In consequence (and by default), these relationships fall within the purview of the *Ontario Labour Relations Act*. (See: *Board of Education for the City of Windsor*, [1978] OLRB Rep. July 699, and *Ottawa Board of Education*, [1983] OLRB Rep. May 694.)
6. The parties do not dispute that the employment relationships in the Scarborough Board’s summer programme are governed by the *Labour Relations Act*. They agree that the *Labour Relations Act* applies. They disagree about whether the named respondents, or any of them, have engaged in conduct which would be considered unlawful under that Act.
7. The fact that the Scarborough Board’s summer school programmes are not governed by the *School Boards and Teachers Collective Negotiations Act* does not mean that they are of no concern to the teachers employed by the Scarborough Board. On the contrary, in these days of declining student enrollment, economic uncertainty, and income restraint, the Scarborough teachers have a real interest in the work opportunities available during the summer.

Over the years, District 16 has tried to negotiate preferred access to these jobs as well as a level of remuneration equivalent to what its members would be paid under the terms of the collective agreement. Since many of the credit courses offered during the summer are the same as those offered in the fall and winter terms, the Scarborough teachers' position is that they should have at least a right of first refusal in respect of these work opportunities, and that when they are employed during the summer they should be paid at a rate equivalent to what they earn when performing similar duties during the regular school year. In order to preserve its flexibility, the Scarborough Board has traditionally rejected both demands.

8. The most recent agreement between the Scarborough Board and District 16 was expected to expire on August 31, 1982. In January, 1982, District 16 served the employer with notice to bargain with a view to concluding a new collective agreement. Negotiations proceeded slowly, throughout 1982 and into 1983, and from the teachers' point of view, there was no satisfactory resolution of the issues involving the summer programme. The Scarborough Board was unwilling to concede preferential access or wage parity. This prompted the provincial executive of the OSSTF to issue what is commonly known as a "pink letter". The pink letter is dated February 24, 1983, bears the signatures of the President and General Secretary of OSSTF, and reads as follows:

INFORMATION BULLETIN TO THE MEMBERS OF THE ONTARIO
SECONDARY SCHOOL TEACHERS' FEDERATION

BOARD OF EDUCATION FOR THE BOROUGH OF SCARBOROUGH

Re: Summer School 1983 and Night School Credit Courses 1983-84

1. The members of O.S.S.T.F. in Scarborough, District 16, and the O.S.S.T.F. Provincial Executive, have been unsuccessful in negotiating with the Board of Education for the Borough of Scarborough a satisfactory settlement of the assignment to, and remuneration for, Summer School 1983 and Night School Credit Courses 1983-84.
2. Consequently, the Ontario Secondary School Teachers' Federation membership is advised that teaching positions with the Board of Education for the Borough of Scarborough relating to Summer School 1983 and Night School Credit Courses 1983-84, are unacceptable.
3. Any O.S.S.T.F. members who apply for or accept employment with the Board of Education for the Borough of Scarborough for the above positions until further notice shall not receive support from this Federation in matters relating to contractual and/or professional difficulties until such time as the Provincial Executive of O.S.S.T.F. declares that the member may once again receive support. It is the duty of members under O.S.S.T.F. By-law 4, Section 2(1)(k), to refuse to accept employment described in this Information Bulletin.

THE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION

“Malcolm Buchanan”
President

“L.M. Richardson”
General Secretary

9. The purpose of the pink letter is obvious. It is a form of boycott designed to put pressure on the Scarborough Board to achieve a collective bargaining objective: preferential hiring for Scarborough teachers and higher salaries for those who teach in the summer programme. All OSSTF members in Ontario are urged to support this embargo. Those who do not, risk the imposition of sanctions. The “pink letter” enjoins members of the OSSTF not to *apply for or accept* positions with the Scarborough Board. It says nothing about the position of those who may have already applied for and accepted positions.

10. To mount a successful summer programme requires more than just teachers to teach the specified courses. It also requires an established complement of principals, vice-principals, and curriculum resource personnel to administer the programme and monitor the course content. In the ordinary course of things, these administrative personnel must be recruited and in place well before the summer programme gets underway. If the summer programme is to be successful – particularly in its early stages – the curriculum and administrative framework must be established well in advance. Traditionally, these positions have all been filled by teachers employed by the Scarborough Board, on permanent contract, in the regular day school programme.

11. Positions for summer school principals, vice-principals, and curriculum resource teachers, were advertised in the fall of 1982. Potential candidates were advised that applications should be submitted prior to November 15, 1982 to Ms. Alice McEachern, assistant superintendent of student and community services. Applications were received and a number of interviews were conducted.

12. The successful candidates were notified in writing. The letter of appointment sent to Peter Baker is typical of those sent to other successful applicants. Mr. Baker is a teacher at Wexford Collegiate and was to become the summer school principal at Stephen Leacock Collegiate Institute. His letter of appointment reads as follows:

This is to inform you that after careful consideration of your application you have been appointed to the position of Principal at Stephen Leacock Collegiate Institute Summer Day School, 1983.

Ms. Gail Darling of Sir Oliver Mowat Collegiate Institute has been appointed as Vice-Principal.

Mr. M. Roberts and Mr. Don Robb who were members of the selection committee will also be working with you to assist in the organization of your programs. In that connection a meeting will be convened early in the new year.

Yours truly.

13. During the interviews preceding the selection of the successful candidates, there was no detailed discussion about remuneration. The principals and vice-principals understood that

they would receive an amount based upon what had been paid in the previous summer together with a percentage increase which was yet to be determined. Those like Peter Baker, who had worked in the summer programme before, may have been aware (as Baker was) that the salary would include both a basic allowance, and a weekly payment. The curriculum resource teachers understood that they would receive payment at an hourly rate of \$19.00 per hour. However, no money was paid, or expected, prior to the commencement of the summer programme. Ron Hinzel testified that he thought that any administrative duties undertaken before the programme started were covered in the lump sum payments made periodically during the summer. Mr. Hinzel worked in the 1982 summer programme and was to be a summer school principal again in 1983.

14. It will be observed that the letters of appointment contemplate that preliminary organizational meetings in connection with the summer programme would begin early in the new year. They did. On Wednesday, January 19, 1983, Ms. McEachern met with Brian Punchard and Ron Fitton, the principals in the summer night school programme. Like the other principals, they shared the responsibility for the course selection, the revision of course descriptions, the preparation of promotional material, the hiring of secretarial and teaching staff, projecting student enrollment, the deployment of classrooms, and so on. These matters had to be resolved, or administrative procedures established to deal with them, well before the students began to register for the summer programme. For example, one of the matters to be discussed on January 19th (as Ms. McEachern noted in her memo advising Punchard and Fitton of the meeting) was the desirability of modifying the course offerings and related promotional material in light of the recent interest in computer-related courses. These and other matters were canvassed at the meeting. It was expected that Fitton and Punchard would apply themselves to the resolution of any problems which arose so that the programme for which they were responsible would be successful.

15. Nadeen Bender testified that following the confirmation of her appointment as a curriculum resource teacher (guidance) on February 3, 1983, she too began to prepare for her summer role. In particular, she was asked to set up a workshop for guidance teachers which would be conducted during the late spring, so that there would be uniformity in the criteria for enrollment in the summer remedial programmes. To this end, she met, twice, with Ed Moran, the principal at Birchmount Collegiate, whom Alice McEachern had suggested would help set up a committee to consider the workshop content. Ms. Bender also contacted a number of individuals with specific expertise to solicit their participation on the committee. Once again, this administrative work had to be completed prior to student registration and the actual commencement of the summer programme.

16. A similar picture emerges from a perusal of the minutes of meetings held on February 1, 1983 and March 1, 1983, and attended by the other principals, vice-principals and some of the curriculum resource teachers associated with the summer day school. Once more, there was a discussion of such matters as: the revision of registration forms, the modification of the calendar of course offerings, the rewriting of course descriptions, the selection of secretarial support staff, and the necessary documentation and procedures for hiring teachers – particularly those from “out-of-borough”. Ad hoc committees were struck to perform some of these administrative tasks (such as rewriting course descriptions), and in each case a provision was made for further discussions. For example, there was to be a further meeting in April to review the application forms of teachers who had applied to work in the programme.

17. We need not multiply the examples or review the evidence in detail. That evidence clearly establishes that the respondent principals, vice-principals and curriculum resource teachers had undertaken duties in connection with their appointment to positions in the summer programme well before their mass resignation.

18. The pink letter of February 24, 1983 was not entirely unexpected. Negotiations had reached an impasse and on February 22nd, Andy Andoniadis, the President of District 16, circulated a memo about it to the District membership. That memo entitled "From the Office of The President, District 16 OSSTF" includes the following paragraph:

INFORMATION BULLETINS (PINK LETTERS) ANNOUNCED

It was announced at Provincial Council that the Provincial Executive has approved the issuance of "Pink Letters" on Night School/Summer School Credit Courses on the *Ottawa Board of Education* and the *Durham Board of Education*. Furthermore, the Provincial Executive has approved, this week, the issuance of an Information Bulletin on the *Scarborough Board of Education* concerning Summer School Credit Courses 1983 and Night School Credit Courses for the school year 1983-84. As the Metro Districts are in Takeover, the date of issuance of the Information Bulletin will be determined by the Takeover Chairman. It will be issued in the very near future, depending on the Board's response to our request at the negotiations table.

Teachers who have applied or accepted positions in these programs are forewarned that they will be prohibited by OSSTF by-laws from working in Night School or Summer School, when the Pink Letter is issued. If you require further information, phone the District 16 Office.

[emphasis added]

According to Andoniadis, the boycott applied not only to teachers who had *applied* for positions in the summer programme, but also to individuals – like the principals, vice-principals and curriculum resource teachers – who had already *accepted* such positions. They were expected to "resign" – as they subsequently did. In a telephone conversation, shortly after the release of the pink letter, Andoniadis expressed the same opinion to John Saso, who was to be the summer principal of L'Amoreaux Collegiate.

19. For some of the respondents, the issuance of the pink letter was not an unwelcome event. The summer programme had been the focus of debate for some time, and in the summer of 1982, the District had been urged to "show some backbone", to "take a strong stand", and to "put some teeth" into its demand for preferential hiring and better pay for Scarborough teachers. John Saso, Ron Hinz, and Peter Baker – summer principals at L'Amoreaux Collegiate, Midland Avenue Collegiate, and Stephen Leacock Collegiate, respectively, – all regarded the pink letter as a positive initiative which should be supported. Keith Hubbard, a curriculum resource teacher, was less enthusiastic. When asked why he had submitted his resignation, he testified that he thought the sanctions mentioned in the pink letter and the memo from Andoniadis were not worth risking. David Bergson, the summer school vice-principal at Midland Avenue Collegiate, was prepared to support the OSSTF's collective bargaining

objective, but he too testified that he was initially concerned that if he did not resign he might face reprisals. As he put it, the threat of sanctions if he did not resign put him “between a rock and a hard place”. It was only later, after his resignation letter had been submitted, that he learned that the OSSTF probably would not take action against those who chose not to resign.

20. The pink letter was a topic of some concern, both before and after its release, for (at least as interpreted by Andoniadis) it appeared to require the principals, vice-principals and curriculum resource teachers to repudiate a commitment which they had already undertaken. John Saso and Peter Baker decided that it would be useful to have a meeting of all of the individuals affected in order to discuss the matter as a group. Since there was another summer school organization meeting scheduled for March 1st, and since all of the principals and vice-principals were expected to attend, Baker decided that this would be an appropriate opportunity to discuss the pink letter. He approached Alice McEachern for permission to hold a “second meeting” to discuss “Federation business” after the administration meeting was completed. Ms. McEachern gave her consent. Efforts were then made to contact the principals and vice-principals by telephone to advise them of the second meeting and its purpose.

21. A day or two before the March 1st meeting, Saso spoke to Andoniadis once again, and obtained from him a suggested form of words for a resignation letter. That wording was ultimately used by most of the principals and vice-principals when they subsequently tendered their resignations. By this time, Saso had already decided to resign. So had Baker and Hinzl.

22. The second meeting on March 1st proceeded as scheduled. None of the officers of District 16 were present, nor was there any formal agenda or chairperson. However, Baker and Saso both sought to focus the conversations, and there was extensive discussion of the pink letter, the need to support the OSSTF bargaining position, the wording which should be used in a resignation letter, and the manner in which such letters should be distributed to the Scarborough Board.

23. Baker described the meeting as a process of “consensus building”. Saso produced and circulated the suggested wording for a resignation letter which he had earlier received from Andoniadis, and explained that the Federation thought it was unwise to make any overt reference to the collective bargaining impasse – presumably to make it more difficult to conclude that those present were acting in concert or in accordance with a common understanding. The wording seemed to meet the approval of the group, although there was no express agreement to use it. Saso also volunteered to collect all of the individual resignations and deliver them, as a group, to the Scarborough Board offices. It was thought that this would have more impact, and would avoid the potential stigma of being the first to resign. As David Bergson put it, if all of the resignations were delivered at the same time, the teachers’ action would not be “personalized”. It is a little ironic – not to say contradictory – that the resignees now contend that their actions were not taken in concert or in accordance with a common understanding but were acts of individual conscience.

24. From the tone of the meeting, it was anticipated that most, if not all, of those present would resign. As it turned out, they all did. By the following day, Saso had received resignations from all but one of the individuals who had attended the meeting. He put each resignation letter in a separate envelope, which he then addressed individually, to the attention

of Ms. McEachern. To avoid any personal notariety, Saso asked Andy Andoniadis to deliver the letters to the Scarborough Board, which he (Andoniadis) subsequently did.

25. Despite the absence of any overt reference to the collective bargaining situation, it is obvious that the resignations were a response to the Scarborough Board's negotiating position, solicited by Andoniadis, and designed to strengthen the OSSTF's hand at the bargaining table. All of the witnesses testified that but for the pink letter they would not have resigned; moreover, if the bargaining issues had been resolved prior to the beginning of the summer programme, they would have been pleased to undertake their appointed tasks.

26. Nadeen Bender, a curriculum resource teacher, did not attend the March 1st meeting, although she was later told about it. Upon receipt of the pink letter she assumed that it was her responsibility to resign – a conclusion which is hardly surprising given the Information Bulletin from the President of District 16 indicating that those who had *accepted* positions in the summer programme would be prohibited by OSSTF by-laws from working. She wrote to the Scarborough Board on March 2nd, citing the pink letter as the reason for her withdrawal from the programme. So did Keith Hubbard, who wrote to Ms. McEachern as early as February 25th. Hugh Miller, a curriculum resource teacher, sent in his letter of resignation on March 7th. Miller had attended the meeting of March 1st, but unlike the other principals and vice-principals, he did not use Saso's wording, nor accept his offer to act as courier.

27. On or about March 8, 1983, there was a meeting of the District 16 membership, chaired by Andoniadis, and attended by many of the individuals who, by that time, had submitted their resignations. Andoniadis was pleased with their response. He sought permission to publish the names of the resignees in another information bulletin which would be issued in a couple of days and circulated to all of the teachers employed by the Scarborough Board. A draft of this bulletin was produced, considered, and approved by the resignees who were at the meeting. When issued on March 10, 1983, it contained the following comments with respect to what they had done:

March 10, 1983

To: District 16 Membership

From: Andy Andoniadis, President

INFORMATION BULLETIN (PINK LETTER) UPDATE

The Pink Letter on Summer (Night and Day) School and 1983 Fall Night/Winter Night School has been in effect now for two weeks. The District 16 Executive and the Provincial Executive are very pleased with the response of District 16 members to it and the full support which they have shown. Certain items with respect to the Pink Letter may require clarification.

1. It does apply to the 1983 Summer Night School *credit courses* scheduled to commence in April, as well as the Summer Day School and Fall Night School *credit courses*.

2. The Pink Letter prohibits teachers from *applying* for these positions, as well as working in the programs. *Therefore, any teachers who have applied for or accepted a position prior to the Pink Letter being issued are expected to indicate, in writing, to the Board, that they are withdrawing that application, or resign from the position. There are no exceptions.*

[emphasis added]

3. The Pink Letter applies to all O.S.S.T.F. members in Ontario, not just Scarborough teachers.
4. Although the Pink Letter makes no mention of curriculum writing, the District 16 policy mention (reprinted below) does include these duties. The policy motion reads:

BE IT RESOLVED THAT, it be the policy of District 16 that, regular contract teachers should not accept night school positions or summer school positions which involve the teaching of credit courses, summer positions involving the development of curriculum, summer co-op duties, unless the remuneration for those positions is equivalent to the teacher's regular salary.

5. Scarborough Elementary teachers have been sent a letter requesting that they support our efforts by refraining from taking these positions.
6. We would request that O.S.S.T.F. members approach Occasional Teachers and attempt to enlist their support. If salary rates are raised for these positions, all teachers would benefit. It would be impossible for O.S.S.T.F. surplus teachers to fill all of those positions under the current system.

I would like to inform the District that *all* of the Principals and Vice-Principals of the Summer Night School Program and Summer Day School Program have submitted their resignations. The Curriculum Resource Teachers attached to these programs have done the same. The District 16 Executive appreciates their prompt response in this regard. By taking this action they displayed leadership and set a clear example to other members of the District. Some of the teachers who have resigned or refused to accept positions are:

H. Von Schilling
Gary Cummings
Al Fleming
Inez Elliston
Paul Zolis
Ross McGhee
John Saso
Marg Taylor

Dave Bergson
Wayne Clatworthy
Ron Fitton
Hugh Miller
Brian Punchard
Anne Wilcox
Denise Overall

Peter Baker
Gail Darling
Ron Hinzl

Keith Hubbard
Nadeen Bender
Jim Gilliland

School Guidance Heads have also indicated their support for the Pink Letter. Teachers should be aware, however, that the Student Services Department in each school will continue to counsel students and provide information and application forms for Night School and Summer School. This activity is part of their regular function and is in no way restricted by the Pink Letter.

If any teacher requires further information, please do not hesitate to contact the District 16 Office at 292-9770.

Andy Andoniadis

Note

Many teachers have inquired about their obligations with respect to other voluntary services. Bill 100, Section 71 states that,

“NOTHING IN THIS ACT PRECLUDES A TEACHER, (b)
FROM WITHDRAWING A VOLUNTARY SERVICE IN GOOD
FAITH ON AN INDIVIDUAL BASIS.”

The Information Bulletin of March 10th merely confirms the message conveyed in the Bulletin of February 22nd: persons who had accepted appointments were expected to resign. Those who had already done so were commended for their actions by the executives of OSSTF and its District 16.

28. Jack Hanna, the principal appointed to run the summer outdoor education programme, received the March 10th letter shortly after its release. Hanna had not attended the meetings of March 1st or March 8th, nor had he yet tendered his resignation. Upon receipt of the March 10th notice, however, he decided that it was necessary to “join his colleagues”, and “support the Federation”. He telephoned Andoniadis to obtain the wording which the others had used in their resignation letters, but ultimately decided that he preferred his own. His letter was drafted on March 11th. He indicates that the collective bargaining impasse requires him to resign, but if the situation could be resolved he would be available to fill his appointed position.

29. At the District 16 meeting of March 8th, there was considerable speculation about the possible Scarborough Board response to the resignations of (by that time) virtually the entire complement of principals, vice-principals and curriculum resource teachers. Without their assistance, it was anticipated that the Scarborough Board would face considerable administrative difficulties – as indeed it did. It was hypothesized that the Scarborough Board could either accept the resignations and try to run the programme shorthanded, or with replacements; or, alternatively, it could reject the resignations, and perhaps take legal proceedings to hold the teachers to their commitment. Andoniadis assured those present that there would be no sanctions taken against the teachers if the Scarborough Board adopted the latter

course and if, in face of a rejection of their resignations, the teachers decided to perform their duties. Of course, this information was not communicated to the Scarborough Board.

30. It might be noted that despite Andoniadis' assurance that there would be no reprisals, it is by no means clear that the resignees would have fulfilled their responsibilities, even if they had received an unequivocal rejection of their purported resignations. A number of the individual respondents testified that they would not necessarily have acceded to an employer request to fulfill their appointed responsibilities even if the Scarborough Board had demanded that they do so. Baker testified that he would have consulted with the OSSTF about "the next move". So did Hubbard and Saso. Nadeen Bender testified that she would not have carried on with her duties regardless of what the Scarborough Board said.

31. Following the receipt of the resignation letters, the officials of the Scarborough Board conducted what Ms. McEachern described as a "war council" to consider the employer's options. There was no direct communication with those who had purportedly resigned to indicate that those resignations were, or were not accepted. Indeed, the Scarborough Board did not even acknowledge receipt of the letters, as it ordinarily did whenever it received any communication from the members of its teaching staff. David Bergson testified that the absence of any acknowledgement of his resignation letter in the days and weeks following its submission, prompted him to wonder whether it had, in fact, been accepted. This uncertainty persisted until about March 17th, when the Scarborough Board began advertising in the *Globe & Mail* for replacements to fill the positions to which the resignees had earlier been appointed. The OSSTF purchased counter advertisements to warn prospective applicants of the existence of the pink letter. The resignees assumed that the attempt to recruit replacements meant that the Scarborough Board had accepted their resignations.

32. That is not the evidence of Alice McEachern. She testified that there was never any intention to accept the teachers' resignations. That is why there was no communication to them to that effect, nor even an acknowledgement that the resignation letters had been received. There was some uncertainty as to the most appropriate Scarborough Board response, but the employer's primary concern was to mount the summer programme, despite the pink letter and its consequences. To this end, efforts were made to ascertain whether those who had not yet resigned were planning to do so, and some of those who had indicated an intention to resign were asked to turn over material on which they were working. In those conversations there was no indication that the resignations had been accepted. However, neither was there any indication, at this stage, that the resignations had been rejected, or that the Scarborough Board expected the teachers to continue performing their appointed duties. None of the resignees was specifically instructed to attend, or did attend, the organization meetings scheduled in April. The teachers assumed that this silence from the Scarborough Board meant that their resignations had been accepted.

33. Again this conclusion is refuted by the evidence of Ms. McEachern. She testified that, in the Scarborough Board's view, any command to the teachers to perform their duties would be futile unless the OSSTF was prepared to grant a dispensation – an assessment which is not at all unreasonable, given the evidence before us that many of the named respondents were not prepared to take up their duties without consulting the OSSTF. And, of course, the Scarborough Board was not aware that the teachers had been told that the OSSTF would take no sanctions against them should the Scarborough Board reject their resignations. Any written material issued by the OSSTF (for example, the February 22nd newsletter or the March 10th

pink letter update) suggested precisely the opposite. There was no real expectation that those who had tendered their resignations would return to their duties, even if the resignation letters were formally rejected. That is why the employer considered it prudent to advertise for replacements while it considered what to do. One way or another, it was determined to mount the summer programme, and there remained the possibility that the problem could be resolved at the bargaining table. To put the matter colloquially, the Scarborough Board was trying to "preserve its options" without finally committing itself to any fixed method of staffing the summer school programme. One of those options was to seek a direction from this Board requiring the resignees to fulfill their commitments.

34. Whatever may have been the resignees' understanding of their position, on April 12, 1983, the employer launched the present proceeding claiming that the mass resignations constituted an unlawful strike, and requesting the Labour Relations Board to issue a cease and desist direction – in effect, requiring the resignees to fulfill the duties for which they had been appointed, and prohibiting OSSTF officials from interfering with the performance of those duties. The pleadings in the proceeding before the Labour Relations Board were served on each of the named respondents, and were supplemented by a letter dated April 19, 1983 addressed to each of the resignees. The letter to John Saso is typical and reads as follows:

Re: 1983 Summer School Program

I believe it will be evident to you from the proceedings which The Board of Education for the Borough of Scarborough ("SBE") has commenced before the Ontario Labour Relations Board (the "OLRB") that SBE has not accepted your resignation from the position of Principal at L'Amoreaux Collegiate Institute for the 1983 Summer School program.

In case it was not clear to you, however, the purpose of this letter is to confirm the following points:

1. SBE does not accept your resignation.
2. Notwithstanding the fact that SBE is attempting to make alternative arrangements to staff the Summer School program in the event you do not honour your commitment, SBE expects and wants you to honour your commitment and your position will be available should you honour that commitment.

If you have any questions concerning this matter, please let me know.

35. We recognize that once these proceedings before the Board actually commenced on April 21, 1983, the parties were agreed that the status quo should be maintained pending a determination of their respective legal rights and responsibilities. As it turned out, the evidence consumed several days, so that the hearings were not completed until the summer programme was well underway. This decision will not issue until after it is over. However, it is clear that prior to the first day of hearing there can be no doubt about the position that the employer was taking, and there was still time for the resignees to relent and honour their earlier commitment to participate in the 1983 summer programme. They decided not to do

so, and, in consequence, the employer was forced to adopt a variety of extraordinary and temporary measures so that the summer programme could be maintained.

ARGUMENT

36. The provisions of the *Labour Relations Act*, to which reference might be made, are as follows:

1.-(1) In this Act,

• • • •

(o) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

(p) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

72.-(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act, and

(a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 113(3) to have released to the parties the report of a conciliation board or mediator; or

(b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 113(3) to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

37. The position of the Scarborough Board of Education is fairly simple and can be succinctly summarized. In the Scarborough Board's submission, the principals, vice-principals, and curriculum resource teachers have engaged in a strike which was actively encouraged, procured and supported by officials of the OSSTF. The Scarborough Board points to the call for resignation issued by the President of District 16 on February 22nd, the "consensus building" meeting of March 1st, the common language of the resignation letters which was provided by the President of District 16, the common date and method of delivery, the role of Saso and Baker, and the admission that the purpose of the resignations was to put collective bargaining pressure on the Scarborough Board. Following their resignations the resignees were commended for supporting the OSSTF cause – an action which prompted the only principal who had not yet resigned to join his colleagues in what he, at least, regarded as a collective response to the OSSTF's call for support. The employer's position is that the principals, vice-principals and curriculum resource teachers were "employees" who had already undertaken some of their responsibilities at the time that they decided to resign, and that those resignations were a refusal to work in concert, in combination, and in accordance with a common understanding. The employer further argues that the OSSTF is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, with the result that its officials are prohibited by section 74 from calling, encouraging or supporting an unlawful strike. In any event, the employer argues, the OSSTF is an incorporated entity (which is not disputed) so that it is a "person" within the meaning of section 76(1) of the Act. As a corporate "person", it is liable for the misconduct of its officials or agents. Andoniadis is both a "person" to whom section 76 applies, as well as an official or agent of OSSTF, and Andoniadis played an important role in encouraging and supporting the mass resignations. Counsel points out that although Andoniadis was present throughout the proceeding, he did not testify, nor was there any evidence from any other official of OSSTF and its District 16. The employer seeks a declaration that the principals, vice-principals and curriculum resource teachers have engaged in an unlawful strike and that the unlawful strike was counselled, procured, encouraged and supported by the provincial OSSTF and its District 16. No monetary relief is requested, nor does the employer seek a cease and desist direction which would require the resignees to fulfill their obligations. It was recognized that by the time this decision will issue, such relief would be academic. However, the employer does seek a direction against the teacher organization requiring it to lift the pink letter as it applies to persons who have agreed to teach in the summer programmes and an order to refrain from threatening reprisals or any other form of internal union discipline against the teachers who choose to live up to commitments which they have made. The Scarborough Board also seeks a cease and desist direction prohibiting OSSTF officials or agents from counselling, etc., an unlawful strike.

38. On behalf of the individual respondents, it is argued that, at the time they submitted their resignations, there was no subsisting employment relationship with the Scarborough Board of Education. There was, at most, a contract of hiring which, it is said, is different from a contract of employment (see: *Mullen v. Millar* [1925] 2 D.L.R. 321, 56 O.L.R. 345, and *Aebig v. Henschel* [1941] 1 W.W.R. 443). It is submitted that neither of the primary indicia of an employment relationship – work for wages – are present here, because the summer programme had not yet begun and no one had yet been paid. Indeed, the level of remuneration had not even been determined. The resignees argue that since they were not employees at the time the resignations were submitted, section 1(1)(o) can have no application to them.

39. The resignees argue, in the alternative, that even if there was a subsisting employment relationship, all that has occurred is a series of individual, voluntary "quits". It is

submitted that this is the right of every employee and even if undertaken in concert, cannot be considered a strike within the meaning of the *Labour Relations Act*. However, it is not conceded that the teachers did act in concert. It is submitted that the resignations were acts of individual conscience which are insufficient to meet the requirement of concerted action required by the definition of a strike.

40. The respondents further argued that even if the submission of their resignations could be said to be in concert, the evidence establishes that those resignations were accepted. It is argued that this precludes the employer from asserting that the resignations constitute a collective refusal to work. The respondents submitted that, by its conduct, the employer has permitted the resignees to withdraw from the summer programme, and when it sought to replace them with others, it was repudiating whatever pre-existing relationship there might have been.

41. In the further alternative, the respondents argue that even if there was a strike within the meaning of the *Labour Relations Act*, the Labour Relations Board should exercise its discretion to decline to grant any remedy at this stage. Not only would it be academic, but, the respondents note, the Scarborough Board waited some six weeks after the resignations were tendered before launching the present proceedings. If the Scarborough Board was concerned about an unlawful strike and had not, in fact, accepted the resignations, why wait six weeks before seeking a legal remedy? The respondents ask how the Scarborough Board can now complain about disruption when the programme was almost underway before any determination was made to communicate to the teachers and indicate unequivocally that their resignations had not been accepted.

42. On behalf of the teachers' organization and its officials, it is argued that the evidence does not establish that it is a trade union within the meaning of the *Labour Relations Act*. It is also argued that there is nothing to connect the officials of the (Provincial) OSSTF to any of the conduct here complained of.

DECISION

43. We begin by observing that section 1(1)(o) of the Act cannot be considered in the abstract. Not only is the language of the section very general, and expressed to be "inclusive" (i.e., there may be forms of prohibited conduct not specifically enumerated in the definition), but it is also part of a general statutory scheme designed to encourage orderly collective bargaining and promote industrial peace. Two critical elements of that statutory scheme are the method for the acquisition of bargaining rights, and the absolute prohibition on collective economic sanctions until the compulsory conciliation process has been exhausted. It is not disputed in this case that the OSSTF has not sought certification under the *Labour Relations Act* to become the bargaining agent for the individuals employed in the Scarborough Board's summer programmes, nor was there any resort to conciliation before the resignees were urged to, and subsequently did, withdraw their services from the summer programme. If the action complained of can be considered a strike within the meaning of the Act, there is no doubt that it would be both untimely and illegal.

44. Was the action of the resignees a strike? In our view it was. There was a refusal to work or continue to work, that action was taken in concert or in accordance with a common understanding, and it was intended to interfere and did, in fact, interfere with the operation

of the Scarborough Board's summer programmes. The resignees had each undertaken to work in the summer programme, including the performance of such duties as were required prior to the registration of students and the beginning of classes. By their resignations, each of the resignees was refusing to perform or continue to perform those duties; moreover, the resignations were not the result of an individual decision taken in response to the personal circumstances of each teacher. They were solicited by Andy Andoniadis, on pain of sanctions, in support of the OSSTF bargaining position. In the case of the resignees who attended the March 1st "second meeting" and all sent in their resignations the following day, the actions can only be regarded as a collective response to the OSSTF's call for support. Peter Baker himself described the meeting as a process of "consensus building" – words which, on their ordinary meaning, imply the development of a "group solidarity in sentiment and belief" (to use the definition found in Webster's Dictionary). Jack Hanna did not regard his resignation as an individual effort motivated by purely personal concerns. He thought he was joining the group supporting the Federation. No doubt, in a sense, each individual decided to submit a separate resignation – just as in *Domglass*, [1976] OLRB Rep. Oct. 569, each employee decided to heed the call of the Canadian Labour Congress to engage in a political strike – but it is pure sophistry to argue, as the respondents do, that their actions were not taken in concert or in accordance with a common understanding.

45. Nor were their actions a true "quit" as counsel submits, because it was admitted (and some of the individual respondents hoped) that if the collective bargaining problems with the Scarborough Board could be resolved, all of the resignees were quite prepared to continue with their duties. Their "resignations" were not an unconditional or irrevocable severance of a subsisting employment relationship. Quite the contrary; the whole purpose of their refusal to continue working was to put pressure on the Scarborough Board to make concessions with respect to the terms of the employment relationships in its summer programmes to the immediate and future benefit of both the resignees themselves, and their fellow members of District 16. Yet it is precisely this kind of resort to collective economic sanctions which is regulated by the *Labour Relations Act*. There may well be cases where it is difficult to distinguish a concerted refusal to continue to work from a mass severance of employment relationships; but this is not one of them. Nor, given the limited remedy sought by the Scarborough Board, need we concern ourselves with either *Charter of Rights* or industrial relations policy considerations which might persuade this Board not to issue a direction which, in effect, requires specific performance of employment contracts outside a formalized collective bargaining regime. (However, see: *Weyerhaeuser Canada Ltd.* [1976] 2 Can. L.R.B. Rep. 41, where the British Columbia Labour Relations Board had no difficulty construing a "mass quit" to be a strike when it had an evident collective bargaining motivation.)

46. The only remaining question in this matter is whether the resignees can be considered to be employees within the meaning of section 1(1)(o) of the Act. In our view, they were. They had been appointed to perform certain duties in connection with the summer programme, they had actually entered upon the performance of such duties, and, in a colloquial sense, they all thought that they had a job. The fact that they had not yet been paid is not determinative, for there is no reason to discount the evidence which suggests that payments due after the programme started would cover the miscellaneous administrative duties which had to be performed prior to student registration. There may well be a distinction at common law between a "contract of hiring" and a "contract of employment", but we do not think such distinction necessarily governs the interpretation of the *Labour Relations Act*. Indeed, in appropriate cases the Board has found that individuals are not employees within the meaning

of a provision of the Act, even though they clearly were employees at common law and the Courts have affirmed that common law concepts do not always provide an unfailing guide for the resolution of legal issues arising in a collective bargaining context (see for example: *Blouin Drywall Contractors Limited v. United Brotherhood of Carpenters and Joiners of America, Local 2486* 75 CLLC ¶14,295; and *International Longshoremen's Assoc. et al. v. Maritime Employers' Assoc. et al* 78 CLLC ¶14,171). Of course, the Board does not have carte blanche to rewrite the statute, but, by the same token, it has a responsibility to give an interpretation to section 1(1)(o) which will best accommodate the statutory objective of promoting orderly collective bargaining and industrial peace. We find that the resignees were employees within the meaning of section 1(1)(o) of the Act and, accordingly, that their mass resignation constituted an unlawful strike. We further find that this unlawful strike was counselled, encouraged and supported by Andy Andoniadis, the President of District 16.

47. Did the Scarborough Board, by its conduct, repudiate the relationship with the resignees so that, at least by March 17th, it was at an end? This is primarily a factual question, and we find, on the evidence, that there was no severance, or intention to sever, the relationship with the resignees – whatever they may have believed. Indeed, the Scarborough Board decided specifically *not* to accept the teachers' resignations while it examined its options. Those options included hiring replacements, launching legal proceedings to hold the resignees to their commitments, or both. As it turned out, the Scarborough Board embraced both options as it was entitled and prudent to do, given the uncertainty that either would accomplish its main objective: to run the summer programme as scheduled. It may be that if enough replacements could have been found, the Scarborough Board might have accepted the resignations. But, on the evidence before us, it is clear that the Scarborough Board did not do so, and, in the circumstances of this case, we see no reason why the delay occasioned by considering its alternatives should deprive it of the relief which it now seeks.

48. It is said that the OSSTF is not a trade union and that, therefore, the actions of its officers, officials or agents cannot occasion liability under section 74 of the Act. Having examined the constitution and bylaws of the OSSTF, as well as the collective bargaining role which it plays and which is recognized in the *School Boards and Teachers Collective Negotiations Act*, we find that the OSSTF meets the definition of trade union found in section 1(1)(p) of the *Labour Relations Act*.

49. The pink letter, as framed, does not call for resignations and, therefore, cannot be construed, in itself, as a call to engage in an unlawful strike. Absent such express call for resignations, it might have been difficult to conclude that there had been any impropriety such as would trigger a remedy against OSSTF. However, Andoniadis is the president of District 16 and a participant in the bargaining process which, at the time of the issuance of the pink letter was in "take-over", that is, being run by OSSTF, and it is difficult to believe that the OSSTF officials were not fully aware of the resignations and their purpose. In the February 22nd Information Bulletin Andoniadis purports to be announcing a decision of the OSSTF Provincial Executive which is then interpreted as requiring resignations. The March 10th Information Bulletin indicates that both "the District 16 Executive and the Provincial Executive are very pleased with the response of District 16 members", then goes on to repeat the obligation to resign and commend those who have already done so. There is no evidence that OSSTF or any of its other officials ever sought to repudiate Andoniadis' position. Andoniadis, although present throughout the hearing, did not testify, nor did any other official of OSSTF.

In the circumstances, we are prepared to draw an adverse inference. We find that the respondent OSSTF and its District 16 have contravened section 74 of the *Labour Relations Act*.

50. We are not satisfied on the basis of the evidence before us that the other named officials of OSSTF or its negotiators were actively engaged in soliciting the support of the resignees – although again, they must have been aware of the action which the resignees took. The complaint insofar as it applies to these respondents must therefore be dismissed.

51. Having regard to the foregoing, the Board makes the following determinations, declarations, and remedial directions:

- a) the Board finds and declares that the principals, vice-principals, and curriculum resource teachers, more particularly listed on Schedule “I” hereto, have engaged in an unlawful strike;
- b) the Board finds and declares that Andy Andoniadis, the president of District 16 of the Ontario Secondary School Teachers’ Federation has counselled, procured, supported and encouraged an unlawful strike, and has further done acts which he knew or ought to have known would, as a probable and reasonable consequence, induce other persons to engage in an unlawful strike;
- c) the Board directs that the respondent Andy Andoniadis forthwith cease and desist from calling, counselling, procuring, supporting or encouraging an unlawful strike, and further, that he cease and desist from any act if he knows or ought to know that, as a probable and reasonable consequence, another person or persons will engage in an unlawful strike;
- d) the Board finds and declares that the Ontario Secondary School Teachers’ Federation has called or authorized an unlawful strike;
- e) the Board directs that the Ontario Secondary School Teachers’ Federation forthwith cease and desist from calling, or authorizing an unlawful strike, or threatening to do so; and, in particular, from counselling, procuring, supporting or encouraging the resignation of individuals who have accepted and been appointed to positions in the Scarborough Board of Education’s summer programmes; and
- f) the Board further directs that the Ontario Secondary School Teachers’ Federation and its District 16 advise all of the teacher members of District 16 that they will not be penalized in any way for refusing to engage in strike activity which the Board has found to be unlawful.

52. The complaint is dismissed insofar as it relates to the individuals more particularly set out on Schedule “II” attached hereto.

DECISION OF BOARD MEMBER L. COLLINS;

1. The question before the Board in this case was whether certain principals, vice-principals and teachers (the “resignees” to adopt the term used by the majority) engaged in an unlawful strike within the meaning of the *Labour Relations Act*. Only *employees* can engage in a strike contrary to the *Labour Relations Act*. (See the definition of “strike” in section 1(1)(o) of the Act). This Board has already found that the mere fact that persons were employed by the applicant pursuant to the *School Boards and Teachers Collective Negotiations Act* did not establish that they were employees of the applicant under the *Labour Relations Act*. (*Ottawa Board of Education*, [1983] OLRB Rep. May 694). It therefore became necessary to decide whether the resignees were employees in relation to the applicant’s summer programme during the time it alleged that they were engaging in an unlawful strike.

2. I agree with the majority’s review of the evidence and I too find that the resignees had not acted individually according to their own consciences, but had tendered their resignations in accordance with a common understanding at the urging of the Federation. I also find, concurring with the majority, that they had entered into an employment relationship under the *Labour Relations Act* with the applicant in respect of the summer programme when their employment applications were accepted and they commenced doing the necessary preparatory work for that programme. However, the majority and I disagree over the characterization of the resignees’ status following the tendering of their resignations.

3. In my opinion, the resignees unilaterally “quit” their employment in respect of the applicant’s summer programme. The resignees clearly decided, as a group, that they no longer wished to be employed in the summer programme because they were not satisfied with the terms and conditions of employment in that programme. Clearly, employees have the option of deciding that they no longer wish to be employed, and they may resign from or quit their employment without being in violation of the *Labour Relations Act*. See section 77 of the Act which states:

Nothing in this Act prohibits...*the quitting of employment* for cause if the...quitting does not constitute a...strike.

[emphasis added]

Once employees have quit or resigned from employment, they are no longer employees. Therefore, they cannot be participating in or engaging in a strike against their employer following their resignation. (See *Ecodyne Limited*, [1979] OLRB Rep. July 629 at 638.)

4. The resignees in this case were not actively at work in the summer programme at the time they resigned from their employment in that programme. Unlike the *Ecodyne* case, *supra*, the resignees here tendered their resignations at a time when they were not at work. Therefore, they did not, *while employees of the applicant in relation to the summer programme*, refuse to work or to continue to work for the applicant. Their refusal occurred *after* their resignation, at a time when they were not employees and thus were not capable of engaging in a strike against the applicant.

5. The majority states that the resignees did not actually quit because they admitted that they were prepared to resume their duties if the collective bargaining problems that the

Federation had with the applicant were resolved. While that admission was made, I take a different view of its effect. I find that the resignees would have been prepared to become employed once again in the applicant's summer programme, if the terms and conditions became acceptable to them. However, the applicant was free to fill its positions with anyone willing to accept employment, and was under no obligation to the resignees to offer them employment or to hire them for the summer programme after they had quit. I do not believe that the resignees intended to maintain their employment with the applicant in relation to the summer programme after they had quit. They resigned from their employment and from that point forward ceased to be employees, regardless of how the applicant treated their resignations.

6. Employees are free, as a group, to decide to quit their employment if they are not satisfied with it. While their action of quitting may, depending on the circumstances, give rise to a momentary strike, as in the *Ecodyne* case, employees who decide to quit and advise their employer outside of working hours that they have quit, end their employment relationship at the time they quit, and their later refusal or failure to report for work cannot be a strike because they are no longer employees. In my opinion, the latter situation applies to this case, and for that reason, I would dismiss the application.

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[Schedules "A", I and II omitted]

1583-83-R Ironworkers District Council of Ontario, Applicant, v. Semple-Gooder Roofing Ltd., Respondent, v. Ontario Sheet Metal Workers' Conference, Intervener

Certification – Construction Industry – Practice and Procedure – Ironworker's filing ICI application for traditional craft unit – Sheetmetal Workers claiming that work performed by subject employees covered by its agreement – Sheetmetal workers not claiming to represent any subject employee – Having no status to intervene – Dispute over work jurisdiction not appropriate to be raised in representation proceeding – Application not untimely

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members F. W. Murray and H. Kobryn.

APPEARANCES: *David Starkman and Allan MacIsaac for the applicant; G. L. Gooder for the respondent; A. M. Minsky and W. Ward for the intervener.*

DECISION OF THE BOARD; November 18, 1983

1. This application for certification has been made under the construction industry provisions of the *Labour Relations Act*. The applicant Ironworkers' District Council of Ontario ("the Council") has applied to be the exclusive bargaining agent for all ironworkers and ironworkers' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Board's geographic area #8. A bargaining unit described

in terms of ironworkers and ironworkers' apprentices is the traditional craft unit usually granted by the Board to the Council or its affiliated bargaining agents. The Council has described in paragraph 4 of the application the specific nature of the respondent's business affected by the application as the "installation of all structural and miscellaneous metal". It has used the identical phrase to describe in paragraph 5 of the application the nature of work being performed by the employees employed in the bargaining unit claimed to be appropriate for collective bargaining.

3. The Ontario Sheet Metal Workers' Conference ("the Conference") filed a timely "Intervention, Construction Industry" form claiming that the application for certification was not timely on two grounds. First, the work performed by the employees in the bargaining unit that the Council claims to be appropriate for collective bargaining is work covered by the Sheet Metal Workers' Provincial Agreement which is binding upon the Conference and the respondent, particularly by clause 19 of Appendix A - Sheeting and Decking; and, pursuant to Article 8 of that agreement, the respondent is required to employ only members of the Conference or its constituent local trade unions to perform work covered by that agreement. Second, the Sheet Metal Workers' Provincial Agreement expires April 30, 1984 and applications for certifications with respect to employees or work covered by that Agreement are timely under the Act only during the last 60 days of the agreement's operation.

4. Those grounds formed the basis of a request by the Conference to have the application put on for hearing. Accordingly, it was scheduled for hearing for the purpose of receiving the representations of the parties regarding the timeliness of the application and all matters arising out of intervention filed by the Conference.

5. It is common ground between the parties that the respondent is bound to the Sheet Metal Workers' Provincial Agreement. That agreement purports to cover all certified journeymen, sheet metal workers or registered apprentices, sheeter/deckers, welders, sheeter's assistants, material handlers and probationary employees employed by the respondent in the sheeting and decking segment of the sheetmetal industry. It does not purport to cover ironworkers and ironworkers' apprentices.

6. The Board heard the submissions of the parties, in the form of opening statements, on the matters raised by the intervention filed by the Conference. With respect to the timeliness issue, counsel for the Conference submitted that the work which the ironworkers were doing at the time of the application involved the re-location of channel iron and angle iron bracing of the roof deck in areas where holes were to be cut in the roof for ventilation purposes. Counsel contended that the work was not work which forms part of the ironworkers' craft and is work performed by sheet metal workers pursuant to the Sheet Metal Workers' Provincial Agreement. That same work, counsel claims, has been performed in the past by the respondent using sheet metal workers and the sheet metal workers trade has performed that work throughout the Province of Ontario. Therefore, since the work on which the application for certification is based is work traditionally performed by sheet metal workers and is not ironworkers craft work under section 6(3) of the Act, the work cannot form the basis of a craft bargaining unit of ironworkers. In other words, a claim of the ironworkers for a craft bargaining unit based on this work would not satisfy the criteria of section 6(3) of the Act. Furthermore, the effect of allowing the ironworkers its traditional unit if it were to be

comprised of employees of the respondent who, at the time of the application, were performing work covered by the Sheet Metal Workers' Provincial Agreement, would be tantamount to allowing the Council to carve out its craft unit from the existing sheetmetal workers craft unit and, when the Board is disposed to allow the carving out of a craft bargaining unit from another existing unit, it only does so during the open period of the relevant collective agreement. In that context, therefore, the application is untimely and should be dismissed.

7. Counsel for the Conference also advised the Board that he would be placing a new issue before the Board, an issue which would require him to request adjournment of the proceedings. He told the Board that he had learned of the matter when he met the respondent's representative for the first time while waiting for these proceedings to commence. He said that the issue had come to light when he asked the respondent why he had requested ironworkers from one of the Council's affiliated local unions to do work which had been done previously by Sheet Metal Workers employed by the respondent. The respondent, according to counsel, informed him that the respondent's foreman on the job had advised the respondent that some ironworkers employed on the job with another contractor were saying that there might be problems on the job if ironworkers were not hired to do the work in question. According to counsel, that is when the respondent hired the ironworkers for whom the Council seeks to be certified.

8. The respondent's submissions were in general agreement with those of counsel for the Conference with respect to the timeliness issue and the alleged threats about possible problems on the job. The respondent told the Board that he has been a roofing contractor for 40 years. The work in question herein is work which he does only infrequently, but when it has been necessary to do that kind of work, the respondent stated that he always performed it using sheet metal workers. The respondent has no collective agreement with any other building trade union. He told the Board that his work on the project had been seriously delayed by adverse weather and, as a result, he was under constant pressure from the owner and the general contractor on the project to get the job done. The specific work in question herein was a very small part of a substantial contract. It involved the breaking of welds on roof bracing near the location of 40 openings which had to be cut in the roof, all of which was part of the respondent's contract, and re-locating the roof deck bracing to support the roof around the holes. The original welds had been done by sheet metal workers according to the respondent. By the time it was possible to begin work on the roof bracing, ironworkers were at work on the project. When a sub-contractor engaged by the respondent started to do the work, trouble developed because the sub-contractor employed non-union labour. In an attempt to resolve that problem, the respondent engaged a unionized mechanical sub-contractor to do the work. Apparently that sub-contractor employed the boilermaker trade and again, according to the respondent, there were threats that the job would be "wobbled" if the work was not done using ironworkers. The respondent claims that these problems brought him under further pressure from the general contractor to get the work done. At this point, the respondent approved his foreman's suggestion that they hire two ironworkers from the local hiring hall and after doing so, this application was made.

9. The Council's counsel took the position that the work in question was in fact performed by ironworkers on whose behalf the Council was seeking to obtain bargaining rights with the respondent and, further, that the Council is entitled to be certified for its traditional construction industry bargaining unit described in terms of ironworkers and ironworkers apprentices employed by the respondent at the making of the application. Counsel contended that

the Council was not seeking to represent sheetmetal workers and no trade union held bargaining rights for ironworkers at the time of the application, therefore it is a timely application for certification. The Council claims that the work which was done by ironworkers comes within the scope of work covered by the Ironworker's Provincial Agreement in clause 1.5(a). The Council also asserts that, during the entire time when the work was being performed by ironworkers, sheet metal workers were working on the project for the respondent. Therefore, if the sheet metal workers has wished to challenge the work as being work covered by the Sheet Metal Workers' Provincial Agreement, that could have been done by means other than challenging this application. The Board presumes that this was a reference to the procedures for the resolution of grievances or jurisdictional disputes in the Sheet Metal Workers' Provincial Agreement or under the Act. Counsel for the Council, therefore, contends that the Board should not allow this intervention because it would lead to a situation in which the Board was dealing with a work jurisdiction issue in the context of an application for certification, a situation not in the best interests of the certification procedures under the Act.

10. With respect to the alleged threat that there might be trouble on the job if ironworkers were not employed for the work at issue and the attendant request for adjournment of the proceedings, counsel for the Council contended that the respondent obviously did not consider the alleged threats of sufficient substance to bring them to the Board's attention because it had neither filed a reply to the application nor any charges that trouble on the job had been threatened. Since there was no reference to threats in the intervention either, the Council claims that it came to the hearing scheduled for its application with no knowledge of the events alleged only to be faced with a request to adjourn the hearing into its application to give the Conference an opportunity to investigate whether threats had been made that there would be trouble on the project if the work in question was not done by ironworkers and, if evidence of threats was uncovered, to file charges and particulars. That, counsel argued, is nothing more than seeking an adjournment in order to investigate whether threats were made at all and hardly forms a basis for adjourning a certification proceeding. Counsel for the Council, therefore, asked the Board to deny the request for adjournment.

11. The Board adjourned the hearing in order to review and consider the parties' submissions and then made the following ruling orally. That ruling is hereby confirmed. When the Board returned to make its ruling, the respondent's representative was no longer in attendance.

(1) This is an application for certification under the construction industry provisions of the *Labour Relations Act* in which the applicant is seeking its traditional craft unit of iron workers and ironworker's apprentices employed by the respondent.

(2) Except for certain classes of employees like survey crews and operating engineers, when the Board is certifying trade unions in the construction industry it does not describe bargaining units in terms of the work to be performed by the particular trade or class of employee involved. See *Acadia Engineering Limited*, [1970] OLRB Rep. Dec. 986. Rather the Board describes construction industry bargaining units in terms of trade classifications. For example, were the Board to issue a certificate to the Council, the bargaining unit would be described in terms of ironworkers and ironworkers' apprentices and would be absent reference to

any specific work, even the "installation of structural and miscellaneous metal" work stated in paragraph 5 of the application as the work being performed by the employees in the bargaining unit sought by the Council. Work described in paragraph 5 of construction industry applications for certification is not considered by the Board as a claim to jurisdiction over that work. The Board considers such description to serve informational purposes only. See *Steed and Evans*, [1970] OLRB Rep. Apr. 64.

(3) The Board has long recognized that there are overlapping claims to work performed by various of the trade classifications used by the Board to describe bargaining units in the construction industry. The Board has not accepted those overlapping or competing claims as proper matters for a representation proceeding. Such proceedings are not the appropriate medium for making any determination with respect to the work jurisdiction claims of trade unions engaged in the construction industry. Such claims are more properly dealt with under those procedures in collective agreements or in the Act designed for the resolution of work assignment disputes. Similarly, representation issues are more properly dealt with in certification or termination proceedings.

(4) The proceeding before the Board in the instant case is a certification proceeding. The Conference has intervened in the proceeding, not on the basis of representing any employees who would be part of the bargaining unit which the Council is seeking, but on the basis of an apparently overlapping claim with respect to work jurisdiction. That overlapping claim is also the basis of the Conference's assertion that, because the work is alleged to be work covered by the Sheet Metal Workers' Provincial Agreement, the application is not timely. Since the Board considers a certification proceeding not to be an appropriate medium for determining work jurisdiction claims, a claim of work jurisdiction is not an appropriate basis for intervening in this application.

(5) Since the Conference does not claim to represent any of the persons who would be included in a bargaining unit described in terms of ironworkers and ironworkers' apprentices, it lacks status to intervene in the application. That being the case, the Conference lacks status to request an adjournment of the proceedings. Therefore, since the respondent is not present to pursue to allegations of threats and since no charges were raised either prior to the hearing or in it, the Board will not adjourn the proceedings.

12. Board Member F. W. Murray concurred in the Board's ruling but added his view that it would be open to the respondent to request reconsideration of the Board's ruling should he file charges and particulars concerning the alleged threats and acts of intimidation referred to during the hearing.

13. In the result, there is no bar to the Board proceeding to determine this application for certification.

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[Balance of decision re union status, bargaining unit, membership evidence etc. omitted]

0616-83-U Local 354, United Textile Workers of America, Complainant, v. Silknit Limited, Respondent

Practice and Procedure – Unfair Labour Practice – Prior decision finding serious unfair labour practices by employer – Parties unable to agree on compensation for loss of overtime work – Board determining entitlement and amount – Whether Board awarding costs in view of employer causing unnecessary hearing and failure to attend – Allegations of continuing unfair labour practices by employer must be dealt with in further hearing after particularization

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and P. J. O’Keeffe.

APPEARANCES: *Larry Robbins, Zafar Islam, Ralph Strickland and Babu Shah for the complainant; no one appearing for the respondent.*

DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; November 28, 1983

1. This is a complaint filed pursuant to section 89 of the *Labour Relations Act*. By a decision of the Board dated August 12, 1983, (now reported at [1983] OLRB Rep. Aug. 1362) the Board found that there had been a serious interference with the statutory rights of both the complainant union and its president, Zafar Islam. The details of that decision need not be reproduced here. It suffices to say that the respondent employer harassed, victimized, and ultimately discharged Mr. Islam because he spoke against his employer’s call for a cut in wages and sought to pursue (too vigorously for his employer’s liking) the employees’ collective bargaining rights. The Board found that the grievor’s discharge was illegal and observed:

While tact and diplomacy are important if the job of a union official is to be performed effectively, employees cannot be harassed, victimized or put in fear for their own jobs if they choose to stand for union office or, once elected, seek to effectively pursue the grievances of their fellow employees. If an employer were permitted to pick and choose whom it could recognize, and rid itself of union officials with whom it was displeased, the independence of the union would be totally compromised and the employees’ statutory rights largely illusory.

The Board directed that Mr. Islam be reinstated in his employment forthwith, and compensated for all wages and benefits lost by reason of his unlawful discharge. The Board remained seized of the question of compensation in the event that there was any difficulty in calculating the quantum of compensation to which Mr. Islam was entitled by reason of this remedial direction.

2. By letter dated October 3, 1983, the representative of the union wrote to the Board to advise that there was, indeed, a question concerning the quantum of compensation to which Mr. Islam was entitled. The respondent was resisting payment of certain overtime pay which, it was said, Mr. Islam would have earned had he not been illegally discharged. The respondent appears to have taken the position that such overtime was a speculative matter which should not, as it put it, "be scheduled into an employee's earning potential".
3. Given this dispute between the parties, a hearing was scheduled to give both of them an opportunity to make their submissions. Mr. Islam appeared with his witnesses and a legal representative to establish the basis for his claim in respect of lost overtime pay. No one appeared on behalf of the employer to articulate its position, just as the employer did not appear at the original unfair labour practice hearing to put forward any defence. In consequence, as before, the complainant's evidence is uncontradicted.
4. Mr. Islam is a "team leader A" in the dye house. As such, he is fully familiar with all of the jobs in the three sections into which the dye house work force is subdivided. That is why he is a team leader A. In contrast, a team leader C is only familiar with the jobs in one of these subsections.
5. There were approximately nineteen employees working in the dye house in August. On the three weekends in question, approximately twelve of those employees were called upon to work overtime. The evidence further establishes that it is the company's practice to assign overtime to senior qualified employees. We have no doubt, and find, that had Mr. Islam not been unlawfully discharged he would have worked overtime on the three weekends in question along with many of his less qualified and less senior fellow employees.
6. Having regard to the foregoing, the number of hours worked on those three weekends, and Mr. Islam's hourly rate at the time, the Board finds that had he not been unlawfully discharged he would have earned the sum of two hundred dollars and sixty-one cents (\$200.61) in overtime pay in addition to his regular earnings. The Board therefore directs that such sum be paid to Mr. Islam forthwith. In the circumstances, we are also constrained to note that, on the evidence, there is nothing speculative or uncertain about this loss nor any reasonable basis why the respondent should have refused to recognize it and compensate the grievor in accordance with the Board's remedial order. Had Mr. Islam not been illegally fired he would have been at work. There is no other reasonable inference. Thus, this hearing was really quite unnecessary.
7. The union claims that because the employer had no real basis for failing to pay the sums described above, precipitated this hearing unnecessarily, then did not even appear, the Board should consider awarding the complainant its "costs". The union points out that, apart from legal fees, it has had to shoulder the burden of reimbursing employees for their lost time when they had to take a day off work to appear as witnesses and formally prove such uncontested facts as the number of overtime hours worked on the days in question. In the union's

submission, the Board should not condone an employer taking insubstantial, unmeritorious, or frivolous positions which it does not even appear to defend when the result is to precipitate an unnecessary hearing with attendant costs to the union and the grievor. The union asserts that it is unjust to have to spend hundreds of dollars to recover modest amounts which should not have been disputed in the first place. Without an order to pay costs unnecessarily incurred, a full vindication of the employees' *statutory* rights would depend upon the relative economic strength of the contending parties – a test which would often leave aggrieved employees at a severe disadvantage. It is argued that this is especially so in the instant case where the employer has “thumbed its nose” at the grievor, the statute, and the Board. Counsel detailed the efforts made to settle this case before the first hearing, after the Board decision, and before the second hearing – yet the company was not only unresponsive but, in both cases, did not even trouble itself to make an appearances at the hearing. Meanwhile, the union and the grievor have twice been put to considerable expense to assemble evidence and obtain the presence of witnesses for a hearing in which the complainant's position was not contested. Accordingly, the complainant renews the request which it made at the first hearing in which the employer failed to appear, for a “cost component” to be included in the Board's compensation award. In the union's submission, that is the only way he can truly be “made whole” for what he has lost, and it distinguishes earlier Board decisions rejecting similar claims on the basis of the respondent's non-appearance.

8. We are not entirely unsympathetic to the complainant's concern, for we recognize that a party may well have to expend substantial sums in connection with proceedings under the *Labour Relations Act*. Moreover, there is something to be said for the argument that if one can obtain costs upon the vindication of private law rights, the measure of compensation for the successful assertion of public rights guaranteed by statute should be no less generous. However, there are a number of difficulties with this superficially attractive proposition. In the first place, costs are not dealt with explicitly in the statute, with the result that it is arguable that the Board has no jurisdiction to award costs except as a part of the compensation award flowing from a finding of a statutory violation. Thus, there may be no authority to compensate a party respondent which has successfully resisted or defended against a claim. And how should one deal with a situation in which, from a practical or legal stand point, success is divided? The law of costs in the civil process is both technical and complex, and there are good policy reasons why it should not be readily imported into a law of collective bargaining which has survived without it for forty years and which the laymen who operate within the system and regularly appear before the Board have some difficulty understanding as it is. Finally, while it is tempting to suggest that flagrant or egregious violations of the statute should result in a “make whole” remedy in which the aggrieved party is compensated for the costs of the proceeding, it is much less clear how one would distinguish an “ordinary” violation of the statute from a “flagrant” one or a frivolous assertion from one which is arguable but ultimately rejected. It is one thing to suggest that a serious breach of the *Labour Relations Act* may trigger special remedial considerations or call for ingenuity in fashioning the appropriate remedy; it is quite another to suggest that an “ordinary” breach of the Act yields one level of compensation while a “serious” one warrants a higher level of compensation. Such an approach would begin to look “penal” rather than “compensatory” (and see sections 96 – 99 of the Act which are expressly penal in character).

9. This was the rationale in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, where, despite a finding of serious employer misconduct, and a broadly-framed remedial order, the Board denied the union's request for compensation in respect of the costs of bringing a proceeding

before the Board. At the same time, however, the Board indicated that this reluctance to include such items in a compensation award was something which should be reviewed in light of further experience. For example, in practice, it may well not be so difficult to identify those few exceptional cases where a more broadly defined "make whole" remedy would be appropriate – as, for example, where an employer continues to engage in conduct expressly prohibited by a Board order thereby requiring reattendance before the Board in order to give that order practical efficacy. A party which continues to do acts which both the law and a Labour Relations Board order prohibit, forfeits much of the sympathy to which it might otherwise be entitled. However, on the basis of the material presently before us, we are not satisfied that the employer's conduct rises to that level or the circumstances fall within those parameters such that, at this stage, the Board should depart from the policy enunciated in *Radio Shack*.

10. The final matter which was addressed at the hearing and which must, therefore, be dealt with shortly, was initially raised in a letter to the Board (with a copy to the respondent) dated November 4, 1983. In that letter the complainant asserts that the respondent has continued to harass and unlawfully interfere with Mr. Islam contrary to both the *Labour Relations Act* and the previous Board order directing the respondent to cease and desist from such unlawful interference. However, these matters were raised some three weeks after the notice of hearing, and it was not entirely clear whether the complainant was: seeking to establish non-compliance so that the Board's original order could be filed in the Supreme Court of Ontario; relying upon these new alleged breaches of the *Labour Relations Act* to secure a new and more effective remedial order; asserting these new illegalities as a ground for revising the original Board order; or some combination of these options.

11. These new charges are serious – not least because, if proven, they would establish the respondent's knowing disregard for the law and require a rigorous remedial response. In the circumstances, therefore, the Board decided not to entertain those allegations at this time. Rather, the Board ruled that the complainant should particularize the new allegations of misconduct and the remedy or remedies (see *supra*) which it was seeking. If the matter could not be amicably resolved between the parties the case could be scheduled for a further hearing before the Board. That will give the respondent an opportunity to consult counsel who will be able to advise the respondent as to its rights and responsibilities in this situation; moreover, it may be that the independent legal advisors of the parties herein may be able to assist their respective clients to fashion an amicable resolution of the dispute which will not require the further intervention of this Board in a collective bargaining relationship of some longevity which has heretofore been relatively free of conflict.

DECISION OF BOARD MEMBER P. J. O'KEEFFE;

1. The facts in this case are set out in the decision of the majority. I join with the majority in its finding and ultimate decision except with respect to their decision rejecting the applicant's request to be compensated for its costs in this action.

2. The evidence respecting costs establishes an amount of \$226.48 for lost time suffered by Mr. Islam and two fellow employee witnesses who attended at the hearing, and of a further amount of \$460.00 representing the costs to the applicant in engaging counsel to prepare and present its case before the Board. Despite the apparent first glance success of the applicant in this proceeding, the simple fact remains that to recover a total amount of \$200.61, Mr. Islam and his two fellow employees who attended at the hearing lost a day's pay each,

totalling, together with travelling costs, an amount of \$226.48. Counsel costs for preparation of the case and appearance at the hearing amount to \$460.00, for a total cost of \$686.48.

3. In view of the history of the respondent company as set out in this decision, it is obvious from the pattern of conduct of the respondent that the majority decision result in this case is a victory for him, when he can cause the applicant to expend their resources to an amount of \$686.48 to recover \$200.61. The non-appearance of the respondent at this hearing and at the original hearing on the unfair labour practice distinguishes this case from *Radio Shack, supra*.

4. In my respectful opinion, the majority is in error when they apply the reasoning in the *Radio Shack* case to the fact situation here. The blatancy of the wrongdoing by the respondent in this case may well compare with the fact situation in the *Radio Shack* case, however, the very clear departure from *Radio Shack* is the total contempt shown by the respondent herein in failing to attend at the hearings on both occasions to show respect for the process and to offer a defence for its gross violation of the law on the face of the allegations against him. The respondent in *Radio Shack* on the other hand demonstrated some respect for this Board and its process by its representations at their hearings and the spirited defence of their position.

5. With respect to the majority decision, I feel strongly that in the context of the brutality of the facts in this case, genteel learned legal academic musings are not the prescription to right the gross wrongs suffered by Mr. Zafar Islam. The facts set out in this case, which are uncontradicted, set out a pattern of conduct that disgraces the word "employer" and must surely be abhorrent to the great majority of employers in our society. The respondent herein has jack-booted himself through the work place, trampling on the citizen civil liberties and human rights of Mr. Islam and has demonstrated to all of its employees and the applicant union herein its contempt for the *Labour Relations Act*, this Board, and its due process. I have difficulty equating a system where even the most minor offender against property rights is required to attend at a hearing into his alleged offence while gross offenders against personal civil liberty rights can, as in this case, thumb their nose at such hearing into their alleged offences to deal with the charges against them as demonstrated by the high-handed contemptuous manner of the respondent employer in this case. Those of us who cherish our basic freedom, and those who in our society stand up for fundamental rights are well served by Mr. Zafar Islam and his kind. We must defend the right, and, to round out this decision, at the very least, we must consent to the request of the applicant and award it full costs in this action. I would so order.

1680-83-R Chris Rantanen, Applicant, v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and its Local Union No. 387, Respondent, v. **Star Bottling Works Limited**, Intervener

Conciliation – Practice and Procedure – Termination – Dispute as to date of appointment of conciliation officer – Date of letter of notice to parties and not date of internal ministry memo governing – Application held timely

BEFORE: D. E. Franks, Vice-Chairman, and Board Members F. W. Murray and C. A. Balentine.

APPEARANCES: *B. Fishbein and C. Rantanen for the applicant; E. G. Posen and Paul Poirier for the respondent; G. G. Smith for the intervener.*

DECISION OF THE BOARD; November 30, 1983

1. This is an application for termination made pursuant to section 57(2) of the Act.

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3. Counsel for the respondent trade union argued that the present application was untimely having regard in particular to section 61(2) of the Act. That section reads as follows:

“Where notice has been given under section 53 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless, following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

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whichever is later.”

It is common ground between the parties that the appropriate notice has been given under section 53 and that there was bargaining between the respondent trade union and the intervener employer. The present application for termination was made on October 21, 1983. The application would, therefore, be untimely if prior to October 21, 1983, the Minister had appointed a conciliation officer or a mediator pursuant to the *Labour Relations Act*. At issue between the parties on this matter was whether the Board should take as the date of appointment the date upon which the Deputy Minister of Labour notified the parties of the appointment of a conciliation officer. That letter is in a standard form letter, and in the present case is dated October 24, 1983 addressed to the respondent trade union and reads as follows:

“This is to advise that the Minister of Labour has appointed Mr. S. Craig as Conciliation Officer to confer with the parties and to endeavour to effect a collective agreement between them.

Please note that Mr. Craig will convene a meeting of the parties on Wednesday November 16, 1983 at 10:00 A.M. President Hotel, 99 Elm Street, West, Sudbury, Ontario.”

Counsel for the intervener argues that the appropriate date for taking the appointment of the conciliation officer is October 19, 1983. In support of this contention he offers an internal memorandum from the Conciliation and Mediation Services dated October 19, 1983 which reads as follows:

“The Minister has determined that the services of a Conciliation Officer shall be made available to the above mentioned parties who have encountered difficulties in completing a collective agreement.

The Minister has appointed you as Conciliation Officer to meet with the parties and assist them and to report thereon to the Minister.”

4. A similar matter to the present one was considered by the Board in a series of cases re *Ventar Ltd.*, *Vendrasco Ltd.*, *T. Barbesin & Sons Ltd.*, *Jack Mocer Co. Ltd.*, [1978] OLRB Rep. Oct. 959 which was reviewed by the Divisional Court in an unreported decision dated January 30, 1979 which denied judicial review in the Board's decision. In the *Ventar* case, *supra*, the Board accepted as the date of appointment the letter from the Deputy Minister notifying the parties and in accepting such they reasoned as follows:

“Should the Board go behind the standard letter of notice and examine the Ministry's internal procedures to determine when the Request for Appointment of a Conciliation Officer form was referred by the Minister to the Conciliation Branch? We think not. The problem with such an approach is that the date of appointment would not be readily ascertainable by the parties to the negotiations since they would not be privy to the Ministry's process. The Board considers it important that, especially in light of the time limit imposed by section 17 of the Act, that the parties know quickly and with certainty the point at which the conciliation process commences. This objective is best achieved by using the date of the official notice as the date of appointment rather than by examining the Ministry's internal procedures in each case.”

Accordingly, the Board in this case considers the present application to be timely.

5. At the hearing in this matter, the parties agreed that the petition filed in support of the application was voluntary. Accordingly, the Board finds that not less than forty-five per cent of the employees of Star Bottling Works Limited in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of November 3, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have

voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(3) of the Act.

6. The Board directs that a representation vote be taken of the employees of Star Bottling Works Limited. Those eligible to vote are all employees of the Company at Sudbury, Ontario, save and except foremen, persons above the rank of foreman, office staff and students hired for school vacation periods on November 28, 1983 who do not voluntarily terminate their employment or who are not discharged for cause between November 28, 1983 and the date the vote is taken.

7. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Star Bottling Works Limited.

8. The matter is referred to the Registrar.

0200-82-U Alvin Plummer, Complainant, v. Operative Plasterers' & Cement Masons' International Association, Local 172, Respondent, v. **Swing Stage Ltd.**, Intervener

Duty of Fair Representation – Unfair Labour Practice – Employee with no prior disciplinary record discharged – Union declining to file grievance – Past record and doctrine of progressive discipline not considered in deciding no chance of grievance succeeding – Complainant's side of story not sought – Superficial inquiry into employer's allegations – Complainant's phone calls and letters ignored – Non-caring attitude – Board stating no absolute guarantee of arbitration of discharge but finding conduct arbitrary in circumstances

BEFORE: Pamela C. Picher, Vice-Chairman.

APPEARANCES: *E. G. Posen for the complainant; L. C. Arnold and A. Enman for the respondent; Henry Vanderlinde for the intervener.*

DECISION OF THE BOARD; November 18, 1983

1. Alvin Plummer has filed a complaint under the *Labour Relations Act* alleging that the union has breached its duty of fair representation which is set out in section 68 of the Act and provides as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. Mr. Plummer started his employment with Swing Stage Ltd. in August of 1980. Up until the point of his discharge in January of 1982 he worked as a welder-fitter. He holds

welding certificates from both Canadian Pacific Railway where he was employed for two years and from George Brown College where he took upgrading and refresher courses. Effective January 22, 1982 Plummer was given an indefinite lay-off which was designed to permanently terminate his employment at Swing Stage. The union declined to file a grievance over Plummer's termination. His counsel maintains that the union's representation of Plummer was both arbitrary and in bad faith and thus in breach of section 68 of the Act.

3. On or about January 19, 1982 Plummer's foreman, Mr. John Babutac, gave Plummer the following notice informing him that he would be laid off indefinitely:

LAYOFF NOTICE

EMPLOYEE NAME: Alvin Plummer
DEPARTMENT: Manufacturing

DATE: January 18, 1982

LAYOFF EFFECTIVE DATE: January 22, 1982

EXPECTED TERM OF LAYOFF: Indefinite

REASON FOR LAYOFF: Shortage of suitable work for this employee's skill.

"John Babutac"
Authorizing Signature

Five other employees, including another welder, were laid off at the same time as Plummer. The company acknowledged that it hired at least one welder at the same time as it laid off Plummer. Babutac confirmed, however, that the lay-off was intended to be permanent and reflected the company's decision to terminate Plummer for his inability to perform available work. Plummer denies that he was ever informed by the company or his union that the company's intention was to discharge him rather than to simply lay him off for an indefinite period.

4. Babutac was the person responsible for the decisions to both hire and terminate Plummer. He testified that for a considerable time Plummer was fully able to perform the welding work for which he was hired. A couple of months before letting him go, however, Babutac witnessed a drastic deterioration in Plummer's work. For some months before that there had been ups and downs requiring Babutac or his father, a lead hand, to have "little talks" with Plummer. Babutac explained that the problem that had developed with Plummer's work was that he was unable to complete tasks within what Babutac considered to be a reasonable time. He further noted that sometimes his work was done incorrectly. Babutac testified that he gave Plummer a few verbal warnings and finally told him if he didn't show improvement it could lead to his dismissal. Plummer normally worked alone. Babutac commented, though, that on those occasions when he assigned Plummer to work with other employees,

the employees would frequently complain that he would become argumentative. Babutac estimated that the problems with fellow employees started about two or three months before his termination.

5. Babutac explained that the company was fading out the type of welding Plummer originally had been hired to perform and that they no longer needed a full-time welder-fitter to perform that kind of work. According to Babutac, Plummer showed himself unable to perform the faster type of welding the company had come to use. Babutac tried to put Plummer on other available jobs but, according to Babutac, Plummer was also unable to perform them.

6. Babutac stated that he felt there must have been something bothering Plummer because he had not previously exhibited the above mentioned problems. Accordingly, he asked one of Plummer's fellow employees, Mr. Doug Guthrie, who was also the lead hand in charge when Babutac was not there, to speak to him to see if he could uncover a problem. Guthrie testified that Plummer told him that frequently people took his machine away from him so he couldn't work. Guthrie further commented that he found there was some truth to that assertion.

7. Babutac did not consider the suggestion that employees were taking Plummer's machine away from him to be a full or adequate explanation of Plummer's problem. The next step he took, therefore, was to ask the union representative, Mr. Arthur Enman, to speak to Plummer and his fellow employees to see if he could uncover the root of Plummer's problems at work.

8. Mr. Enman is the full-time business manager for Local 172, a position he has held since May of 1980. Prior to that he had been involved with another union for some 7 1/2 years. For a number of those years he was the recording secretary. He testified that he first became aware of Plummer on November 24, 1981 when Mr. Henry Vanderline, the company's vice-president, asked him to speak to Plummer because they were having some problems with his work and attitude and were considering firing him. According to Enman, Vanderline mentioned that Plummer was having difficulty making a particular kind of base and had done some other faulty work that had to be redone. Enman acknowledged that he did not discuss with Vanderline the details of those or any other complaint the company had with Plummer's work performance .

9. Enman further stated that Babutac himself told him that he wanted to fire Plummer because of problems with his work. Although Enman acknowledged that Babutac mentioned a few specific problems, Enman did not press him for details or determine when any of the problems had occurred.

10. Enman then went to speak to Plummer to find out if he was having problems. There are substantial conflicts in the evidence concerning the details of this conversation. The Board accepts that Enman informed Plummer that the company was dissatisfied both with his work and with his ability to get along with employees and was thinking of firing him. Enman acknowledged that he did not tell Plummer what specific complaints the company had with his work. The Board further accepts that when Enman told Plummer that a particular employee had lodged a complaint about him, Plummer stated that that employee wanted to get him fired. Plummer testified that he explained to Enman that he and that particular individual did not get along well because one day that person had taken Plummer's machine after Plummer had

told him not to. Enman summarized his view of his exchange with Plummer: he said he had difficulty getting a straight answer from Plummer and could tell very little from the conversation.

11. Enman's next step was to speak to Plummer's fellow employees. The Board accepts that in November he asked some four or five people about Plummer and received from them a distinctly negative reaction to Plummer. According to Enman, no one had anything good to say about Plummer. During the course of his testimony Plummer recounted a number of racial slurs directed against him by fellow employees. He recalled, for example, that one employee said to another within his earshot, "We want to send these niggers back where they came from." Counsel for Mr. Plummer confirmed, however, that they were not arguing that the union had discriminated against Mr. Plummer. The Board, therefore, makes no finding with respect to any negative racial comments which may or may not have been directed against Plummer.

12. Paul Clarke, a lead hand, was one of the employees approached by Mr. Enman. He stated that in November Enman asked him if there was anything he could say in Plummer's defense. Clarke replied that there was very little he or anyone else could say to support Plummer because of the number of mistakes he was making requiring others to divert their attention from their own work to repair his. Clarke acknowledged that he was not particularly fond of Plummer and that he and Plummer had gotten into an argument.

13. Enman testified that when he reported back to Babutac in November he stated that perhaps if Babutac gave him a chance Plummer's work would improve and he would get along better with his fellow employees. Enman further testified that he informed Vanderline that he had spoken to Plummer and several of his fellow employees and found that their reaction to Plummer was unfavourable. The Board does not accept Enman's further evidence that he either saw a discipline notice on Vanderline's desk warning Plummer in writing that if his performance and attitude didn't improve he could be dismissed or that through his efforts he prevented this notice from being sent to Plummer. It is apparent from the testimony of Vanderline and Babutac that they were not at this point contemplating giving Plummer a written warning. Instead they were considering the larger question of whether they would terminate him directly.

14. Enman did not speak to Plummer between his initial conversation with him in November and the point of his termination in January. Nor did he have further conversations with the company concerning Plummer's work performance. On or about January 18th, Babutac informed Enman that he intended to terminate Plummer. On or about the same day, Enman asked two employees if Plummer's work had improved; the reply was negative.

15. Enman testified that on Friday, January 22 he went to the plant and saw a termination notice for Plummer drawn up and sitting on Vanderline's desk. According to Enman, he told Vanderline that he would be filing a grievance if the termination was unfair. Enman stated that he and Vanderline then discussed the problem of Vanderline not wanting to overrule Plummer's supervisor, Mr. Babutac. Enman stated that with considerable effort he prevailed on Vanderline to change the notice of termination to an indefinite lay-off so that Plummer wouldn't lose an additional four weeks' unemployment insurance.

16. Vanderline's testimony has a somewhat different flavour. He testified that he phoned

Enman in the latter part of January to let him know that the dismissal was going to take place. Enman then requested that the company make it an indefinite lay-off instead. Vanderline testified that Enman's overture was a request at most and that no bargain was struck between the company and the union which would have prevented the union from filing a grievance if the company changed the dismissal into an indefinite lay-off. The evidence in this regard is somewhat confusing. At one point Vanderline stated that he agreed to make the termination a lay-off but then at another point stated that he did not dispute that it was Babutac's decision to put "lay-off" on Plummer's notice. He stated, though, that he would have conveyed to Babutac his conversation with Enman and commented that Babutac might have been influenced by it.

17. Babutac testified that he did not have a discussion with Vanderline or Enman concerning changing Plummer's notice from a termination to a lay-off. He confirmed that the words chosen were his words and that he put "lay-off" on the slip because the original job Plummer was hired to do was no longer available and there was no other job at the plant he was able to perform. He stated that he would have talked to Vanderline a couple of days before the effective date of lay-off to inform him that he was going to let Plummer go as of January 22nd.

18. It is unnecessary to resolve all of the conflicts and inconsistencies in the evidence. The Board will accept that Enman asked Vanderline to give Plummer an indefinite lay-off instead of a discharge, that Vanderline agreed and that whether by coincidence or otherwise, Plummer's termination notice was put in terms of an indefinite lay-off instead of a discharge. It is common ground that Enman did not discuss the lay-off versus discharge question with Plummer.

19. On January 25th, the Monday following his lay-off, Plummer went to the union office to discuss the situation. He stated that he spoke to Enman and asked him to intervene on his behalf because he didn't understand why he was laid off on such short notice particularly when another man had been hired to do his job. According to Plummer, Enman stated that he didn't know anything about it and assured him that he would look into the situation and get back to him with an explanation. Plummer denies that Enman told him that the company had wanted to fire him and that he had arranged a lay-off instead.

20. Enman recalls their conversation differently. He testified that when Plummer came to see him at the union office on January 25th he went through the whole situation telling Plummer exactly what had transpired i.e. that he had changed what would have been a discharge into an indefinite lay-off. He further stated that he told Plummer that for a number of reasons a grievance would be unsuccessful. In this regard he noted that Plummer had had several verbal warnings, that he couldn't find any employee to support him and that several employees were, in fact, willing to support the company. Enman testified that he reminded Plummer that he had told him in November "to keep his nose clean" but that obviously he hadn't because everyone said things had not changed. Enman stated that he told Plummer that the best he could do for him was to get the company to change his notice of discharge into a notice of indefinite lay-off. Enman testified that he told Plummer he would make every effort to do more for him if he could but it seemed to be a hopeless situation. Enman testified that Plummer called him two days later at which time he went over the whole situation again.

21. Again it is unnecessary to resolve all the inconsistencies in the evidence. It may be

that on January 25th Plummer heard what he wanted to hear from Enman and was not receptive to criticism. On Enman's own evidence, though, it is clear that Enman did not *discuss* the situation with Plummer, in the sense of asking him for his side of the allegations. Instead he *told* Plummer how he negotiated an indefinite lay-off and *told* him that a grievance would not succeed because he had had prior verbal warnings and because no fellow employees would support him.

22. The Board further accepts that Plummer was not satisfied with Enman's response and repeatedly, yet unsuccessfully, sought to discuss the situation further with him. In view of Enman's admission (discussed in further detail below) that following their January 25th meeting Enman considered Plummer a "non-priority", the Board declines to accept Enman's assertion, strongly contradicted by Plummer, that Enman went over the whole matter again with Plummer two days following their January 25th meeting. The Board accepts Plummer's statement, confirmed more generally by Enman's own testimony, that he tried repeatedly to get hold of Enman to discuss his situation again but was continually met with a wall of silence. Plummer stated that sometimes he went to the union office twice a day but always found it locked. He stated, and the Board accepts, that while he left messages with the union's answering service along with his name and phone number on some ten occasions, his calls were never returned. Enman acknowledged that Plummer left his number with the union's answering service but asserted that Plummer wasn't in when he returned his call.

23. When Plummer was unable to contact the union by phone he wrote Mr. Enman the following letter:

Mr. Enman,

I know that you have been avoiding me both at your office at 2909 St. Clair and at the answering service.

When I phone and leave my name and phone no. you make sure that you don't call me back.

But that's O.K. I believe for sure that you have no intention of helping me in the fight against the injustice done to me by SWING STAGE LTD. of 60 Howden Rd. Scarborough.

All I'm asking you for is a note stating that you cannot help me. I need a note to that effect now, because we don't want sometime after, you said I should have waited on you.

Please just send such a note. [T]hat's all I'm asking of you then I won't bother you any more. I mean after all man I have paid to you a lot of money over 1 yr. and 6 months. [Y]ou have never done anything for me to deserve all that.

SWING STAGE laid me off and took on a another man right away on my same job. You never even asked what happen[ed].

I paid nearly \$100.00 down and \$8.00 every month, for you to say something, anything. Plus I paid 2 per cent of any weekly salary every week for 1 yr. and 6 months and you never represent[ed] me at any time even when I needed you to say something in my behalf.

And now look at the way you are avoiding me.

Please just send me a note that you can't or won't help me or call me to pick it up.

Thanking you in anticipation.

ALVIN PLUMMER

Phone No. 282-1744

24. Plummer never received a reply to his letter. Enman acknowledged that he received Plummer's letter, probably around the first week of March. He said he read it and threw it in the garbage because he felt it discredited and offended him. He said he felt he had done all he could for Plummer and had explained the whole situation to him on January 25th. He asserted at the hearing that he doesn't reply to a letter like that; he responds when he receives a letter of substance. He commented that running a union is like anything else; there are priorities and after January 25th Plummer's situation became a non-priority because he had explained the situation to Plummer and knew a grievance would not succeed. He said that as far as he was concerned the situation was closed on January 25th.

25. Plummer testified that approximately two weeks after he wrote his letter to Enman he called him at his home on a Sunday and told Enman that he was disappointed because Enman had not kept his promise to find out why he was laid off. According to Plummer, Enman replied that he couldn't help him and stated that Plummer wouldn't want to go back to Swing Stage anyway. Enman agreed that Plummer called him at his home on Sunday but said he couldn't remember the purpose of his call. According to Plummer he never got an explanation from either the union or the company for why he was laid off.

26. In April of 1982, Plummer filed the instant complaint against the union. Some months thereafter, in November of 1982, Plummer was invited to appeal the union's failure to grieve his discharge to the union membership. Mr. Matchelman, the international union representative, assisted him in drawing up his appeal. The issue put before the meeting was whether the union should file a grievance on Plummer's behalf.

27. Plummer maintains that by the time the union meeting turned to his grievance only eight or nine people were left. Prior to discussing Plummer's grievance, the membership had engaged in a heated debate relating to an increase in union dues during which a considerable number of people walked out of the meeting. When Plummer's case was brought forward, there were so few members that a number of employees from Swing Stage who had walked out of the earlier discussion were brought back. Mr. Guthrie, an employee, acknowledged that they had to get a number of people out of a bar to deal with Plummer's case. Plummer maintains that he was not given a fair opportunity to present his case to the membership. He commented that when he tried to speak, those in attendance made so much noise that they couldn't hear him. He further maintains that at the meeting the international representative commented

that if Plummer should win his case and receive back pay then it might affect the bonus of the other employees.

28. Mr. Clarke attended the union meeting at which Plummer's attempt to have the union grieve his discharge was brought to a vote. In his testimony, Clarke displayed some confusion over the precise question considered by the membership that night. Initially, he described the question the members were voting on as "Plummer's attempt to have a grievance brought against the union". Later he said that the vote was taken on whether or not the company should take Plummer back. At another point he stated that the vote was whether the union should file a grievance for Plummer. The vote was taken and approximately 14 voted against filing a grievance for Plummer and approximately 8 voted in favour of it.

29. We turn to consider whether the union acted in accordance with its duty of fair representation in its handling of Plummer's indefinite lay-off. In *Walter Princesdomu and C.U.P.E., Local 1000*, [1975] OLRB Rep. May 444 the Board at pp. 464-465 made the following comment concerning its interpretation of arbitrary representation in section 68 of the Act:

Accordingly at least flagrant errors in processing grievances – errors consistent with a "not caring" attitude – must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 [now section 68] has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.

Counsel for Plummer argues that whether the company's perception of Plummer's work performance was right or wrong, the manner in which Enman considered Plummer's situation was so summary and superficial that it constitutes arbitrary and bad faith representation in violation of the union's duty of fair representation. He further maintains that the union meeting which occurred after Plummer filed his complaint is irrelevant and, in any event, insufficient to cure the union's earlier breach of its duty.

30. Counsel for the union emphasized his view that Enman was an inexperienced, unsophisticated business agent who did not have much of a background in processing grievances. Counsel notes that Enman told Plummer in November that his job was at stake and that he would have to improve; he then conducted an investigation into Plummer's situation by asking fellow employees for their views of Plummer's attitude and his work. Through this process, according to counsel for the union, Enman addressed his mind to what the evidence for and against Plummer would have been if the union had filed a grievance and processed it to arbitration. Counsel argues that the union should not be found to be in violation of the union's duty of fair representation simply because Enman declined to engage in the "window dressing" of going through what he describes as the futile motion of filing a grievance.

31. Counsel for the union argues that Enman made a sincere effort to help Plummer

by persuading the company to convert what was going to be a discharge into a lay-off, thereby both reducing what would otherwise have been his waiting period for unemployment insurance benefits and making it less difficult for him to obtain another job. Counsel admits that Enman should have spoken to Plummer before asking the company to change his termination to an indefinite lay-off but maintains his failure to do so results from inexperience and does not constitute a breach of the union's duty of fair representation. Union counsel further argues that the Board should accept Enman's testimony that he fully explained the situation to Plummer on January 25th when Plummer came to see him in the union office.

32. The Board accepts that in his first conversation with Plummer in November, Enman told Plummer that his job was in jeopardy. Enman had not, however, asked the company for specific details of its complaint with Plummer's work and attitude. Enman, therefore, did not ask Plummer for his side of the company's allegations. Neither in November nor at any time thereafter did Enman ask Plummer for his response to any specific complaints with his work, including the bases that Vanderline had specifically noted as a problem. Enman testified that Babutac told him that he was upset about some 96 cages that had to be rebuilt by others because of Plummer's faulty work. Enman, however, did not ever ask Plummer for his side of that accusation or even find out from Babutac when that alleged mishap had occurred.

33. The one concrete fact Enman told Plummer in his initial conversation was that a named employee had filed a complaint against him. Although Plummer's response was that that employee wanted to get him fired, Enman did not press him for the reason he felt that way. As Enman knew the company was concerned with Plummer's attitude and relationship with his fellow employees, Plummer's assertion that an individual wanted to get him fired should have been considered highly relevant and probed in some detail. When Plummer went to see Enman after he had been terminated Plummer again mentioned that he thought that the named employee might have had something to do with his lay-off. By that time, the evidence shows, Enman had already made up his mind that a grievance on behalf of Plummer would not succeed and he did not explore Plummer's concern about the other employee.

34. Enman testified that he found it difficult to communicate with Plummer and could in fact tell very little from their conversation in November. In the Board's view, however, Enman had an obligation to make additional efforts to communicate with Plummer before concluding that any attempt to grieve Plummer's termination would be unsuccessful.

35. Instead of talking further with the company, either before or after his termination, about the specifics of its complaint against Plummer and instead of discussing the situation with Plummer beyond their initial conversation in November from which Enman stated he could tell very little, Enman canvassed fellow employees for their opinions of Plummer. It is certainly appropriate for a union official to talk with fellow employees to assess the merits of a potential grievor's claim against the company. These discussions, however, cannot take the place of asking the grievor for his side of the story.

36. Moreover, it is apparent that Enman's discussions with fellow employees were highly superficial. Enman testified that Clarke told him he had nothing good to say about Plummer and that Plummer had threatened him with physical violence. The Board concludes, however, that Enman did not ask Clarke for the details of that encounter or go back to Plummer to ask him whether such an argument had occurred. Another employee Enman approached for an opinion about Plummer said "something about his work having to be redone". Once again

Enman did not ask that employee for details or go back to Plummer to ask him for his version. Another employee told Enman that Plummer had a problem getting along with employees and had made some serious errors in his work. Enman did not probe that employee for specific details so that he could return to Plummer for his reaction. Another employee told Enman that once he had to give Plummer instructions several times. Again Enman asked for no surrounding details. It is clear from Plummer's evidence that he might well have had a different version of the events. The Board concludes on the evidence that when Enman canvassed Plummer's fellow employees and learned that they had a negative opinion of Plummer's work performance, he closed his mind to a consideration of the merits of Plummer's situation. Enman closed his mind to Plummer's plight without having ascertained from either the company or Plummer's fellow employees anything beyond the most cursory and broadly swept accusations against Plummer. Moreover, and most critically, Enman closed his mind to considering the merits of Plummer's termination without ever asking Plummer, in a meaningful way, for his side of the story.

37. The union's duty of fair representation requires more. Even if the company had a legitimate complaint with Plummer's work and attitude, Plummer had never been formally disciplined; he had never been given so much as a written warning. Enman did not consider the asset of Plummer's clean record before concluding that filing a grievance on Plummer's behalf would have been a fruitless effort. Babutac, Plummer's foreman and the person who terminated Plummer, testified that Plummer had been a fine employee from the time he was hired until about six months prior to his termination when there was a dramatic deterioration in his work. Enman did not direct his mind to the suddenness of the decline in Plummer's work before deciding that filing a grievance would be a useless effort. Enman did not consider that through the grievance procedure alone, quite apart from proceeding to arbitration, the company and union might have been able to arrive at a mutually satisfying arrangement concerning Plummer. Nor did he consider that through the grievance procedure alone, Plummer might have at least gained the satisfaction of an explanation for his indefinite lay-off, something he maintains he has not yet received. The Board does not suggest that Enman would have to have assessed each and every one of the above factors to have acted in accordance with the duty of fair representation. In the circumstances, however, Enman's failure to consider any of them bespeaks a non-caring attitude.

38. The collective bargaining system and much of the jurisprudence arising out of it, generally accepts the principle of progressive discipline. An employee is normally warned in writing, sometimes more than once when his work performance or his conduct falls below an acceptable standard. A continuation of the substandard conduct may lead to one or more suspensions. Beyond that point, a failure to correct the problem may well provide just cause for the employee's termination. Egregious conduct may in some cases justify a departure from this normal pattern of progressive discipline. Generally, however, an employee may expect to be given adequate warning respecting his conduct or performance before being confronted with the ultimate sanction of discharge. Moreover, an arbitrator may be expected to review with care a discharge which departs from the normal stream of progressive discipline. While it is recognized that the use of progressive discipline may not be as consistently followed in the construction industry where projects are typically of a limited duration, the grievor was employed in the plant at Swing Stage. He did not work on a construction site.

39. Plummer had no disciplinary record whatever before he was summarily discharged through the vehicle of indefinite lay-off. His termination was not preceded by escalating forms

of discipline. It is of concern that the union did not consider the company's obvious failure to follow progressive disciplinary steps before declining to file a grievance in the face of Plummer's termination.

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions gives discharged employees an absolute right to have their terminations reviewed at arbitration. (See Division V.7 (Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C. 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, *P. Reconcilable Differences*, (1980) pp. 137 ff.). In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

41. This Board does not view the language of section 68 of the Act as guaranteeing to every employee the arbitration of his or her discharge. That is not to say, however, that the duty of fair representation contemplated under section 68 of the Act is unable to remain responsive to labour relations realities.

42. The case at hand raises the issue of whether the duty of fair representation is violated when an employee with no prior disciplinary record is discharged and his union, on the basis of a superficial inquiry and without asking the grievor for his side of the story declines to file a grievance.

43. Enman admitted at the end of cross-examination that Plummer had become a "non-priority" after January 25th when Plummer visited him at the union office and he "explained the situation" to him. He stated that as far as he was concerned the matter was closed on January 25th some three days following Plummer's termination. Subsequently, Plummer left countless telephone messages for Enman which Enman simply didn't bother returning. It is apparent to the Board that once Enman felt he had succeeded in turning Plummer's termination into a permanent lay-off he took no further interest in his situation.

44. The Board can only conclude that once Enman learned that Plummer was not a popular employee and that fellow employees would not support him, he concluded on this basis alone that a grievance would be futile and was blinded to whatever merits there might have been to a case made on Plummer's behalf. Conducting a popularity contest does not fulfill a union's duty of fair representation. An employee cannot be denied access to the grievance procedure simply because other employees don't like him.

45. Enman's response to Plummer's letter is disturbing and fully consistent with his failure to fairly represent Plummer. Enman admits that after he read Plummer's letter which asked for a simple response he threw it in the garbage. Enman found the letter offensive and did not think it deserved a reply. Surely an employee who has paid a \$100.00 initiation fee and \$8.00 monthly dues to his union deserves more attention when he has been terminated than to have his letter thrown in the garbage. The Board cannot conclude that Plummer had harassed, bothered or done anything else to Enman to justify Enman's blatant disregard for Plummer's concerns.

46. As noted, the Act does not give an employee an absolute right to have his case grieved and carried to arbitration. In our view, however, the law has evolved beyond the point where the union may simply assert that it has “considered” an employee’s request for help and “decided” not to help him.

47. The decision not to process a grievance for an employee who has been disciplined or discharged may, depending on the circumstances, be a justified and responsible exercise of a union’s prerogatives. Where, however, an employee has been discharged there is an obligation on a union to provide a satisfactory explanation for its decision not to process a grievance. While the legal burden in a section 68 complaint is on the individual complainant, once it is established that a union member has suffered the ultimate sanction of discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration.

48. The union’s explanation in the instant situation that it did not grieve Plummer’s termination because Plummer had received verbal warnings about his work performance and because none of his fellow employees would support him is inadequate because, as detailed above, the union did not ascertain from Plummer his side of the story. The union cannot be said to have directed its mind to the merits of a grievance or potential grievance if it has not ascertained the grievor’s version of the situation. In the Board’s assessment Enman’s “investigation” and handling of Plummer’s situation was so superficial, cursory and ultimately antagonistic that it constitutes arbitrary representation in contravention of section 68 of the Act. Moreover, we are not persuaded that the vote taken among the general membership after Plummer had filed his section 68 complaint was sufficient to cure the prior breach of the Act. (See *North York General Hospital*, [1982] OLRB Rep. Aug. 1190.)

49. In the result, the Board is compelled to conclude on a review of the evidence and argument that the union failed to represent Plummer in accordance with its duty of fair representation.

50. By way of remedy counsel for Plummer requested that the Board, among other steps, direct that the union file a grievance over Plummer’s indefinite lay-off. The Board is satisfied that this is an appropriate remedial step and therefore directs that the union forthwith file a grievance on Plummer’s behalf and process it through the grievance procedure. The Board further directs that the company, for its part, receive and process the grievance without objection concerning its timeliness or any other procedure deficiency arising from the delay.

51. In the event that the grievance is not settled to Plummer’s satisfaction, the Board further directs that the grievance be processed to arbitration. Again the company is directed not to raise a procedural objection. Given the degree of superficiality with which the union dealt with Plummer’s situation as well as the antagonism deployed by Enman following his January 25th meeting with Plummer, the Board is satisfied that the union should be required to process Plummer’s grievance to arbitration if he so requests to fully cure the union’s breach of its duty of fair representation. (See *The Corporation of the County of Hastings*, [1979] OLRB Rep. Nov. 1072 at para. 24.)

52. The Board further directs that the union be represented at the arbitration hearing

by an individual approved by Plummer. Plummer's approval, however, may not be unreasonably withheld. In the event that Plummer ultimately receives compensation, whatever portion is directly attributable to the union's breach of section 68 shall be paid by the union. (See *Leonard Murphy*, [1977] OLRB Rep. March 146 at para. 40; *Massey Ferguson Industries Limited*, [1977] OLRB Rep. April 216; *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338; *North York General Hospital*, [1982] OLRB Rep. August 1190; *Phillip Wayne Bradley*, [1983] OLRB Rep. March 323.)

53. The Board remains seized of this matter to resolve any dispute arising over the interpretation or implementation of the Board's Order.

1500-83-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **Tektron Equipment Corporation**, Respondent, v. Group of Employees, Objectors

Certification – Natural Justice – Petition – Practice and Procedure – Board announcing that petition not having any bearing on outcome of certification application – Board finding rules of natural justice entitling objectors to continued participation in future hearings on application

BEFORE: Owen V. Gray, Vice-Chairman and Board Members W. Gibson and S. Cooke.

APPEARANCES: *Arthur E. Jenkyn and Ralph Currie for the applicant; Barbara G. Crosby and Eugene M. Tekatch for the respondent; Kalpha Gokhruwala, Sandy Karnan and Cathy Tekatch for the objectors.*

DECISION OF THE BOARD; November 10, 1983

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. October 17, 1983, the terminal date fixed for this application, is the date which the Board determines, under section 103(2)(j), to be the time for ascertaining membership under section 7(1).
4. With respect to the appropriate bargaining unit, the parties are in dispute over whether or not persons forming part of what the applicant describes as the "engineering staff" should be included in or excluded from the bargaining unit. The applicant union takes the position that three employees are engaged in what it describes as "engineering technician work": Anthony Tekatch, Cathy Tekatch and Marcus Byjack. It says the community of interest of these employees is with the office and sales staff, and not with the production workers. The parties agree that none of the employees described as part of the "engineering staff" is a professional engineer. The respondent employer takes the position that it does not have

“engineering staff” as such, and that the community of interest of the aforementioned employees is with a production unit.

5. Subject to the question of an exclusion for “engineering staff”, the parties are in agreement that the appropriate bargaining unit consists of all employees of Tektron Equipment Corporation in Stoney Creek, Ontario, save and except supervisors and those above the rank of supervisor, office and sales staff.

6. The union examined the employee list and registered a total of 10 challenges. Three of the applicant’s challenges related to the three employees it identifies as forming part of the “engineering staff”. The Board hereby appoints an officer to meet with the parties and inquire into the issue of composition of the bargaining unit referred to in paragraph 4 of this decision and the question whether the persons referred to in that paragraph are employees of the respondent who fall within either the bargaining unit proposed by the applicant or the bargaining unit proposed by the respondent. The officer is directed to further inquire as to whether or not the following employees are employees of the respondent who fall within the bargaining unit: C. Gauthier, M. Tekatch, B. Martin, M. O’Connor and J. Loomis. The Officer is further directed to inquire into the duties and responsibilities of C. Nelligan and J. Tekatch, whom the applicant claims exercise managerial authority within the meaning of section 1(3)(b) of the Act.

7. At the hearing of this matter the parties were advised that an Officer would be appointed. They were also advised that the petition filed by the objectors would not affect the outcome of this certification application, regardless of the resolution of the bargaining unit and list issues outstanding. The objectors were advised that they would, nevertheless, receive notice of all further proceedings and an opportunity to participate therein.

8. The applicant union took exception to the Board’s observations on the continued status of the objectors, and objected to their further participation. The applicant was invited to and did make submissions on its objections, as did the other parties including the objectors.

9. The applicant union argued that the objectors had status for only one purpose, and that is to provide the necessary evidence on the validity of the petition. It is only necessary to hear that evidence if the petition is “relevant”. The petition is only relevant, of course, if it has been voluntarily signed by one or more persons in respect of whom the applicant union has filed membership evidence and, even then, only if the elimination of that membership evidence from consideration would reduce the union’s apparent support within the bargaining unit to fifty-five per cent or less. Once it becomes apparent that the petition cannot have this effect, the union argues, the petition is irrelevant, the continued presence of the objectors serves no further purpose and they should not be accorded status in respect of any other issue in the proceedings. The union argues that employees with evidence relevant to any other issue can arrange to have either the trade union or the employer call them as a witness in the continuing proceedings.

10. The granting of an application for certification has a substantial effect on the rights and obligations of the individual employees in the bargaining unit for which the certificate is granted. An employee’s right to bargain individually with his or her employer, however real or illusory that right may be, is terminated if the applicant trade union is granted a certificate

for a bargaining unit which includes that employee. The terms and conditions of his employment are thereafter subject to the influence of the trade union, which thereafter has the exclusive right to bargain with respect to his terms and conditions of employment and to establish with his employer a collective agreement by which he is bound by virtue of section 50 of the *Labour Relations Act*. The rules of natural justice require that persons so directly affected by quasi-judicial proceedings be given notice of those proceedings and an opportunity to make representations. Pursuant to the Board's Rules of Practice, notice is given to affected employees of applications for certification (Forms 6, 7 and 78), as well as of applications to terminate bargaining rights (Form 19), applications to declare successor trade union status (Form 24) and applications under Sections 63 and 1(4) (Forms 28 and 33).

11. The Board's power to prescribe procedure and control its process is set out in subsection 102(13) of the Act, which provides:

The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

This subsection expressly recognizes that the Board's discretion with respect to practice and procedure is circumscribed by the rules of natural justice. The application of these rules to the interests of employee objectors was dealt with by Laskin, J.A. (as he then was) in *R.v.O.L.R.B., ex parte Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 (Ont. C.A.) at pp. 466 and 467 in the following terms:

However, to allay any doubts on the matter so far as this Court is concerned, we wish to make it clear that persons who intervene properly in proceedings before the Board and who have an interest in accordance with the Board's own prescriptions made in performance of its statutory duty are entitled to be treated as to notice and otherwise as parties to the proceedings in the same way as those who initiated those proceedings and those who were originally brought into them. *Audi alteram partem* is a principle for their protection no less than for others who are parties.

12. One of the major issues before the Board in a certification application is the degree of support for the applicant trade union among the affected employees. It is to that issue that employee objectors most often address themselves. In that respect, section 73 of the Board's Rules of Procedure requires the timely filing of a written statement of desire in prescribed form in respect of which supporting evidence must be lead by the objectors at the hearing of the application. It is on this issue of representativeness that the board's jurisprudence with respect to "petitions" and their effect on membership evidence comes into play.

13. Sufficiency of membership support is not the only issue with which the Board must deal in a certification application. The Board must also determine the composition of the appropriate bargaining unit and the employee status of persons alleged to be or not be in that unit. As the resolution of those issues can be determinative in individual cases of the effect

of the certification application on employees, employees are equally entitled to make representations on those and, indeed, any other issues pertinent to the disposition of the application: *IlSCO of Canada Limited*, [1973] OLRB Rep. May 221. Examples of cases in which objectors' representations have been entertained with respect to the bargaining unit include *Tamco Limited*, [1974] OLRB Rep. Nov. 764, *Mason Windows Limited*, [1981] OLRB Rep. March 302 and *Windsor Western Hospital Centre Inc.*, [1979] OLRB Rep. May 462. Indeed, in the last mentioned case the position taken by the objectors was at odds with the terms of an agreement between the applicant employer and the respondent union. The status of individual employees or their representatives to make representations with respect to issues other than membership support is not dependent on the timely filing of a statement of desire: *Jim Davidson Motors Ltd.* [1968] OLRB Rep. June 268; *Strathmere Lodge, Middlesex County Home for Aged*, [1973] OLRB Rep. Aug. 425 (and see *Lorain Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734 where a group of employees was granted status to intervene after a pre-hearing vote had been conducted, when applicant trade union had at that point invoked section 8 of the Act.) As the status of an employee or group of employees to make such representations is not dependant on having filed a statement of desire, their status for those purposes cannot be adversely affected by the fact that they have filed a statement of desire which is determined to be irrelevant in the sense described in paragraph 9 above.

14. While the interests of individual employees may often parallel those either of the employer or the union, that does not diminish the employees' right to have notice of and participate in certification hearings. A concerned employee is not limited to offering himself or herself as a witness to one or other of the employer or union, in the hope that by doing so his or her point of view will be represented. Indeed, this Board has made it plain that the employer has no standing as spokesman for its employees except with respect to a narrow range of issues: *Federated Building and Maintenance Co. Ltd.*, [1979] OLRB Rep. Oct. 974.

15. Entitlement to notice and to participate in the manner contemplated in section 102(13) is not, of course, license to make a "mockery" of the Board's proceedings, as the applicant's representative suggested it must necessarily be if objectors are given status on issues other than the voluntariness of a relevant petition. The Board can control its proceedings so as to avoid abuse: *Jordan v. Ontario Labour Relations Board et al.*, (1978) 84 D.L.R. (3d) 557, 78 CLLC ¶14,132 (Ont. Div. Ct.). Obedience to the rules of natural justice does not require that the Board entertain evidence or submissions which are irrelevant or repetitive. The Board remains entitled to control the conduct of its hearings and keep all parties within proper bounds in the presentation of evidence and argument and in the cross-examination of witnesses: Statutory Powers Procedure Act R.S.O. 1980 c. 484, esp. ss. 10 and 23; *Re Henderson and Ontario Securities Commission*, (1977) 14 O.R. (2d) 498 (Ont. Div. Ct.) per Osler, J. at p. 502; *Re Stone and Law Society of Upper Canada*, (1980) 26 O.R. (2d) 166 (Ont. Div. Ct.).

16. The Board therefore confirms the ruling challenged by the applicant union, and reiterates its direction that the objectors herein shall continue to receive notice of proceedings and be entitled to participate therein unless and to the extent that they may choose to waive such rights.

0711-81-R; 0759-81-R United Brotherhood of Carpenters and Joiners of America – Local 1190, Applicant, v. **Two Star Construction Ltd.**, Respondent, v. Labourers' International Union of North America, Local 183, Intervener; Labourers' International Union of North America, Local 183, Applicant, v. **Two Star Construction Ltd.**, Respondent, v. United Brotherhood of Carpenters and Joiners of America, Local 1190, Intervener

Certification – Practice and Procedure – Representation Vote – Vote conducted with regard to certification applications by Carpenters and Labourers – Box sealed pending hearing into allegations against Carpenters' irregular conduct – Carpenters withdrawing application – Labourers withdrawing allegations and requesting counting of ballot – Labourers obtaining less than 50 percent votes – Not entitled to be certified – No bar imposed in circumstances

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Balentine.

***APPEARANCES:** M. Mitchell and C. De Toni for Labourers' International Union of North America, Local 183; D. Wray and D. McKee for United Brotherhood of Carpenters and Joiners of America, Local 1190; no one appearing for the respondent.*

DECISION OF THE BOARD; November 1, 1983

1. In a letter dated October 25, 1983, the United Brotherhood of Carpenters and Joiners of America, Local 1190 ("Local 1190") informed the Board that it was withdrawing from these applications and that the Board might deal with the application for certification by the Labourers' International Union of North America, Local 183 ("Local 183") as it relates to the respondent. Local 1190 added that it was its understanding that its application for certification and its application for certification by intervention would be dismissed by the Board.

2. Local 1190 appeared at the hearing and Local 183, after considering its position, informed the Board that it was neither making representations with respect to continuing with regard to its allegations of improper or irregular conduct nor asking for costs. Local 183 further informed the Board that it was content to have Local 1190 withdraw and to proceed. The Board did not hear further evidence and at the hearing dismissed the application and the intervention by Local 1190.

3. In making submissions, Local 183 argued that it was entitled to be certified. In a decision dated September 16, 1981, the Board directed a representation vote. In that decision the Board recited that more than fifty-five per cent of the employees of the respondent were members of Local 183 and Local 1190. The representation vote was conducted by the Board on September 29, 1981. The ballot box was sealed pending a further direction by the Board. Subsequently, Local 183, even though the Board had not completed hearing its allegations of improper or irregular conduct, withdrew its request that the ballot box be sealed. Local 1190 withdrew its allegations of improper or irregular conduct. In a decision dated April 26, 1983, the Board directed the Registrar to cause the unsegregated ballots to be counted.

4. The unsegregated ballots were counted on May 2, 1983. Seventeen ballots were cast.

One ballot was spoiled, twelve ballots were cast in favour of Local 1190, three ballots were cast in favour of Local 183 and one ballot was segregated and not counted. The Board continued to hear evidence with respect to Local 183's allegations of improper or irregular conduct until the scheduled hearing on October 26, 1983.

5. Local 183 argued that the result of the vote was irrelevant and that since Local 1190 had withdrawn from these proceedings and had withdrawn its membership evidence, Local 183 should be entitled to a certificate. Local 183 further argued that any other result would reward the improper or irregular collusive behaviour of the respondent and Local 1190.

6. Local 183 did not cite any authority for its claim to certification. The Board directed a representation vote pursuant to section 7(2) of the *Labour Relations Act* and upon the taking of the representation vote not more than fifty per cent of the ballots cast were cast in favour of Local 183. The representation vote was directed upon the apparent membership position of Local 183 and Local 1190. The argument of Local 183 that to deny it a certificate would be to reward the improper or irregular collusive behaviour of the respondent and Local 1190 is not persuasive. There were no allegations concerning the conduct of the vote and the Board did not hear all of the evidence regarding the allegations of Local 183 with respect to improper or irregular conduct. In these circumstances, the Board is not prepared to make any finding regarding the allegations of Local 183 with respect to improper or irregular conduct.

7. The application and intervention of Local 183 are hereby dismissed. The Board has the power under section 103(2)(i) of the Act to bar an unsuccessful trade union for any period not exceeding ten months from the date of the dismissal of the unsuccessful application. Following a representation vote in a certification proceeding the Board normally imposes a bar of six months on an unsuccessful trade union. In the circumstances of these applications, however, and bearing in mind the periods of time which have elapsed between the direction of the representation vote, the period during which the ballot box was sealed and the time which has elapsed since the counting of the ballots; the Board is of the view that this is not an appropriate occasion on which to impose a bar.

1556-83-R Mr. Emilio Campea and Mr. George Ohman, Applicants, v. United Steelworkers of America, Respondent

Practice and Procedure – Reconsideration – Termination – Union responding to termination application by advising Board it no longer desires representation – Board terminating bargaining rights under s.57(5) – Union claiming earlier response result of misinformation and seeking reconsideration and direction of vote – Union required to bear consequence of response made hastily and without adequate investigation – No reconsideration

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

DECISION OF THE BOARD; November 21, 1983

1. This is an application for reconsideration of a decision of the Board dated October 27, 1983. In order to put this request for reconsideration in its proper context, it is necessary to briefly review the events preceding that decision.
2. On October 11, 1983, the applicants filed an application pursuant to section 57 of the *Labour Relations Act* seeking termination of the respondent union's bargaining rights. That application was processed in accordance with the Board's usual practice and notice thereof was given to the respondent. By letter dated October 20, 1983, received by the Board on October 26, 1983, counsel for the respondent union wrote to the Board as follows:

I acknowledge receipt of the Notice of Application for Declaration Terminating Bargaining Rights and of Hearing dated October 14, 1983 and note that a hearing has been scheduled in this matter on Monday, November 14, 1983.

Pursuant to Section 57(5) of the Act, I am instructed to advise that the United Steelworkers of America does not desire to continue to represent the employees in the bargaining unit herein.

In these circumstances, I would appreciate it if you would advise of the cancellation of the aforesaid hearing.

Section 57(5) of the Act reads as follows:

Upon an application under subsection (1) or (2), where the trade union concerned informs the Board that it does not desire to continue to represent the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit.

3. In view of the letter from the respondent abandoning bargaining rights pursuant to section 57(5) of the Act, on October 27, 1983, the Board issued a decision formally terminating the respondent's bargaining rights. This generated two further letters from counsel for the respondent dated November 7 and November 8, 1983. They read as follows:

November 7, 1983

I acknowledge receipt of your letter dated October 26, 1983 advising of the cancellation of the hearing scheduled for November 14 as a result of the content of my letter dated October 20, 1983.

I am now instructed to request that the Board reschedule this matter for hearing. The respondent union does desire to continue to represent the employees in the bargaining unit. We no longer ask that section 57(5) be made operative and we shall seek instructions as to whether we shall agree to a representation vote.

Thank you very much for your consideration in this matter.

November 8, 1983

I acknowledge receipt today of your letter dated November 3, 1983 with which was enclosed the decision of the Board in this matter dated October 27, 1983.

The respondent respectfully requests that the Board reconsider this decision pursuant to Section 106 of the Act.

Unfortunately, it was not until yesterday when the undersigned wrote to the Board withdrawing the contents of my letter dated October 20, 1983 that the respondent became aware that in fact there was some substantial doubt as to whether a majority of employees no longer desire to be represented by the respondent. My letter dated October 20, 1983 was based upon inaccurate information and as a result I am instructed to request that the Board reconsider its decision which terminated our bargaining rights.

The respondent desires to agree to the taking of a representation vote and urges the Board to amend its decision accordingly.

Thank you for your attention.

4. Decisions of the Board are intended and expressed by the statute to be "final and conclusive for all purposes". The power of reconsideration is an extraordinary one which should not be lightly exercised. There is nothing in the submissions of the respondent which could not, with the exercise of due diligence, have been put before the Board earlier or at the hearing scheduled in this matter for that very purpose. The respondent was the bargaining agent for the subject employees until such time as the Board terminated those bargaining rights; moreover, the Board's decision to that effect was apparently only received by the respondent on November 7, 1983. We find it a little difficult to understand why it was not until November 7, 1983 that "the respondent became aware that...there was some substantial doubt as to whether a majority of employees no longer desire to be represented". The union itself was aware of the proceeding having been sent notice thereof on October 14, 1983; and there were only a total of four employees listed by the employer as being in the bargaining unit. One

can only infer that the respondent made little or no effort to canvas their views prior to instructing counsel. In any event, the adequacy or otherwise of counsel's instructions or the respondent's investigation in no way diminish the thrust of its submission that it was abandoning its bargaining rights pursuant to section 57(5) of the Act. It may well be having second thoughts now about giving up its bargaining rights, but that is no basis for reconsideration. We reiterate that if a party were permitted to reopen a proceeding because positions which it took reflected inadequate investigation or hasty or incomplete instructions to its counsel, few decisions of the Board would ever be final.

5. The request for reconsiderations is dismissed.

6. After the above was written, but before the Board's decision was actually issued, the Board received another letter from counsel for the respondent dated November 14, 1983. It reads as follows:

Further to our request for reconsideration in this matter, I wish to draw to the Board's attention the fact that Form 19 "Notice to Employees of Application for Declaration Terminating Bargaining Rights and of Hearing" which was forwarded to the employees of Armstrong Jones Ltd. by the Registrar of the Board and was dated October 14, 1983 did not contain a date in paragraph 3 thereof for the fixing of a terminal date for the application. Further, the form did not contain a date in paragraph 8 thereof with respect to a hearing.

The respondent respectfully submits that in the circumstances where the Form 19 contained the apparent defects as set out above, it is appropriate for the Board to exercise its discretion pursuant to Section 106 of the Act and reconsider its decision terminating the bargaining rights of the respondent herein, notwithstanding our early advice to the Board.

The reason for the early advice to the Board dealt directly with the fact that the employees, and in particular a union steward, was mis-advised by the Form 19 which resulted in further mis-communication to counsel.

Thank you very much for your attention to this matter.

7. We have considered the contents of this letter. The fact is, that whatever notice may have been given to the employees of Armstrong Jones Ltd. and whatever its defects, proper notice was given directly to the respondent union itself – as the letter of October 20, 1983 from its counsel clearly indicates. Moreover, it is the *union* and not the employees who have a right to invoke section 57(5) of the Act, and if the union chose to do so hastily or on inadequate information it must bear the consequences of such actions. Indeed, the fact that it took almost a month to "discover" the alleged defects in the notice to employees serves merely to underline that the respondent was apparently prepared to invoke section 57(5) of the Act on the basis of what was then before it – however inadequate that information might subsequently turn out to be. It did not have to do so. Had it remained silent, the case would have proceeded to a hearing and, if the requirements of section 57 were met, a representation vote would have been directed. But once having unequivocally abandoned its bargaining rights pursuant to section 57(5), we do not think it can resile from the consequences of its decision.

8. There is nothing in the most recent letter from the respondent which prompts the Board to reopen this proceeding for a hearing *de novo* or in any other way reconsider the Board's decision of October 27, 1983, terminating the respondent's bargaining rights. If the employees wish to be represented by the respondent or any other union in the future, the statute provides the means for them to accomplish that objective.

1293-83-M The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 and Nino Blassutta, Applicants, v. **Urban Mechanical Contracting 1979 Ltd.**, Respondent

Construction Industry Grievance - Practice and Procedure - Union and Company counsel making final settlement of grievance - Company counsel taking instructions from supervisor believing he had authority to settle - Misunderstanding between employer and supervisor as to latter's authority to settle irrelevant where other party reasonably believed he had authority - Order made in accordance with settlement

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and W. F. Ruth-erford.

APPEARANCES: *Cynthia Morton, Chris Thurrot and Nino Blassutta for the applicants; Irv Kleiner, Ed Winter, Ceasare de Fulviis and Fillipo Verna for the respondent.*

DECISION OF THE BOARD; November 22, 1983

1. The applicants have referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration.

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3. At the commencement of the hearing it became apparent that it was the position of the applicants that a settlement had been reached with the respondent with respect to this grievance. It was the position of the respondent that any agreement which might have been reached was subject to a written settlement and that there had been a misapprehension by one of the respondent's employees of his authority to conclude an agreement.

4. The parties agreed upon the following statements:

On September 26, 1983, there were numerous telephone conversations between counsel between 5:30 p.m. and 10:00 p.m. The purpose of the telephone conversation was to reach a settlement before the Board. The applicant/grievor, Nino Blassutta, attended at the office of Cynthia Morton, counsel for the applicants, and Chris Thurrot, the business representative for the applicants. Counsel for the respondent, Irving Kleiner, was in contact with Ceasare de Fulviis, the supervisor for the respondent.

Mr. Kleiner had asked Mr. de Fulviis if Mr. de Fulviis had the authority to settle this matter. Mr. de Fulviis responded that he did have the authority. On that basis, Mr. Kleiner proceeded to take instructions from Mr. de Fulviis as Ms. Morton did from Mr. Blassutta and Chris Thurrot, a business representative of the applicants.

Numerous proposals and counterproposals were made between counsel during the evening. Both counsel consulted with the persons from whom they were taking instructions regarding the availability of work at the sites of Urban Mechanical. At approximately 7:30 p.m. on September 26, 1983, the following offer was made by counsel for the respondent to counsel for the applicants:

- I The applicants agree to withdraw the within grievance and the within complaint.
- II The grievor, Nino Blassutta, will be hired to a position with the respondent at its project which is located at Spring Garden Avenue in the City of North York. The grievor shall hold this position for the duration of the period during which his services are required.
- III If, at the end of the above-mentioned period, the respondent requires any of its journeymen or members of Local 46 of the applicant to be transferred from any other of its residential to its project at Finch and Kenneth Avenue in the City of North York, the grievor will be the first employee to be transferred to the said project at Finch and Kenneth Avenue providing that he is willing and able to perform the available work.
- IV If at the end of the period referred to in paragraph II herein the respondent determines it must hire new journeymen to perform Local 46 work at the Finch and Kenneth Avenue project the grievor will be offered a position on this project provided that he has not obtained another position of employment and provided that he is willing and able to perform the available work.
- V All of the parties agree and hereby acknowledge that the terms of these minutes of settlement do not constitute an admission of liability on behalf of the respondent, and in fact liability is denied.

5. After having put that offer to Mr. Blassutta, Mr. Kleiner informed Ms. Morton it was the company's final offer and there would be no further negotiations in the morning before the Board and the parties would be proceeding to the Board if this was not acceptable. Ms. Morton informed Mr. Kleiner that both Mr. Blassutta and Mr. Thurrot wanted time to think about the offer and that she would be calling him back at 9:30 p.m. to give him Mr. Blassutta's answer. Mr. Blassutta did accept this offer and Ms. Morton communicated this acceptance to Mr. Kleiner at approximately 9:30 p.m. Ms. Morton called Mr. Kleiner back and said, "Irv, you've got a deal". At that point the parties agreed to adjourn the grievance

sine die pending execution of the minutes of settlement. It was at the suggestion of Mr. Kleiner that the application be adjourned *sine die* rather than withdrawn.

6. Mr. Kleiner asked Ms. Morton if counsel should execute the minutes of settlement or the clients. Ms. Morton suggested that the clients execute the minutes of settlement. Mr. Kleiner stated that Mr. Winters, the president of the company, would be signing on behalf of the company. Mr. Kleiner was going to prepare a typed memorandum of settlement and send the same to Ms. Morton's office the following day for her client's signatures. Ms. Morton asked how soon the job was available for Mr. Blassutta. Mr. Kleiner consulted with Mr. de Fulviis and telephoned Ms. Morton that evening to say that Mr. Blassutta could start on Friday of that week. On the following day, September 27, 1983, Ms. Morton notified the Board of the applicants' request for an adjournment.

7. Ms. Morton did not receive the minutes of settlement on September 27th. However, Mr. Kleiner did telephone her office to inform her that the minutes of settlement had been sent to Mr. Winters for signature. Ms. Morton was out of the office and did not receive this call. The following day, on September 28th, Mr. Kleiner sent the minutes of settlement to Mr. Winters.

8. Mr. Winters called Mr. Kleiner and said he would not sign the settlement because Mr. de Fulviis did not have the authority to instruct Mr. Kleiner to settle on those terms. Mr. Kleiner informed Mr. Winters that he had received instructions from Mr. de Fulviis to settle on the basis of the proposed memorandum. Mr. Winters repeated that Mr. de Fulviis had no such authority and that he considered the settlement unreasonable because it would give Mr. Blassutta super-seniority over other employees who had been employed by the respondent for ten years in some cases.

9. Mr. Kleiner then telephoned Ms. Morton and informed her that Mr. Winters would not be signing the memorandum of settlement. Mr. Kleiner then made a further offer to Ms. Morton which he put in writing and delivered to her office on September 29th. On the same day, Ms. Morton responded to Mr. Kleiner's letter and mailed her letter which was received by Mr. Kleiner on October 3rd. Both letters acknowledged that the settlement was not signed by the clients and that it was because Mr. Kleiner was to prepare the minutes of settlement and send it over to Ms. Morton. This was not done.

10. It was agreed that Mr. Winters, the president of the respondent, attended at the Board on September 27th for the purpose of attending a hearing, not being aware of the fact that counsel for both sides had settled the reference. It is also agreed that there was a misunderstanding between Mr. Winters and Mr. de Fulviis, who occupies the position of supervisor, as to Mr. de Fulviis' authority to enter into an agreement of settlement without first having it approved by Mr. Winters. The misapprehensions between Mr. Winters and Mr. de Fulviis was brought to Ms. Morton's attention after the draft minutes of settlement were forwarded to Mr. Winters for his review. Mr. Winters was aware that settlement discussions were taking place on the evening of September 26th and stated to Mr. Kleiner that if he had any questions to speak to Mr. de Fulviis.

11. It is clear that a settlement was reached between counsel acting on instructions from their clients. Counsel for the respondent indicated on the evening of September 26th that this was the final offer, that no further negotiations would take place and that if the offer was not

accepted the parties would be proceeding before the Board. The substantive matters incorporated into the settlement indicated that a "deal" had been concluded. Mr. Kleiner and Ms. Morton believed that a settlement had been reached. At no time in the settlement discussions was there any question of further amendments to be made to the settlement. The only matter which was outstanding was where the documents were to be signed. Mr. de Fulviis believed he could settle the grievance without anyone's final approval. There was no indication that the settlement required ratification.

12. At no time was it communicated to the applicants or Ms. Morton that someone other than an authorized representative of the respondent was giving instructions or agreed to the settlement. Any misapprehension between Messrs. Winters and de Fulviis, in our opinion, ought not to be relevant to whether there was a settlement between the parties.

13. In this application counsel entered into a settlement which ought to be binding on the parties. The applicant and Ms. Morton were told that Mr. Kleiner was a representative of the respondent and that he was taking instructions from someone at the respondent. Where an agent in the form of counsel holds himself out as having the authority to conclude a settlement, such a settlement should normally be binding on the client. There is no doubt that the applicants were told that Mr. Kleiner was taking instructions from an individual with the respondent.

14. Where an agent holds out to a party that he has the authority to bind his principal to a settlement and if it is reasonable for a party to believe the authority exists in all the circumstances, then the principal ought to be bound. In our opinion, the purpose of executing the settlement was not intended as ratification but rather as a permanent record of settlement. In *Re Bilt-Rite Upholstering Co. Ltd. and Upholsterers' International Union of North America, Local 30 24 L.A.C. (2d) 428*, a board of arbitration advised the question of whether there was a binding settlement of a grievance. At pages 430-431 the board stated:

The board is of the opinion that the parties reached settlement on all substantive matters. There was no matters left in dispute after the parties had reached their settlement. It is true that the settlement contemplated the reduction of the settlement to writing and signing by both parties. However, in our view,, this was a mere procedural matter and was not an essential part of the settlement. If the union had suggested that there was some substantive terms that had not been covered by the settlement, the matter would be quite different. No suggestion was forthcoming.

The board is also of the opinion that the analogy that union counsel attempted to draw between the settlement and the requirement that a collective agreement be in writing is not persuasive.

Similarly, in *Re Continental Can Co. of Canada Ltd. and Graphic Arts International Union, Local 121*, 10 L.A.C. (2d) 35, a board of arbitration was called upon to decide whether there was a settlement of a grievance and whether ratification was necessary in order to make a settlement binding. The board concluded that where the parties, acting through their regular officers, settled a matter which had been processed through the grievance procedure, that settlement was binding and required no ratification to make it binding.

15. The respondent argued that the applicants recognized the tentative nature of the settlement by failing to withdraw the grievance and merely adjourning it *sine die*. This argument overlooks the fact that this conduct by the applicants was induced by the suggestion of counsel for the respondent and does not in any way indicate a lack of belief by the applicants that the grievance had been settled. The respondent argued that there was no detrimental reliance by the applicants. The Board does not agree with this perception by the respondent. The applicants compromised their claims to arrive at a settlement.

16. The respondent further argued that its representative Mr. de Fulviis acted under a misapprehension as to his instructions and that it was the intention of Mr. Winters to be consulted by Mr. de Fulviis prior to any agreement to any settlement proposal. Counsel pointed to the attendance of Mr. Winters in anticipation of a hearing by the Board. The attendance of Mr. Winters, in all the circumstances, points to a lack of communication within the ranks of the respondent rather than any notice to the applicants of any qualification on the authority of Mr. Kleiner or Mr. de Fulviis.

17. The respondent relied upon a decision of the British Columbia Court of Appeal in *Yannacopoulos et al. v. Maple Leaf Milling Co. Ltd. and O'Connor* (1963) 37 D.L.R. (2d) 562, where the court refused to compel observance of a settlement arrived at through a mistake. However, in that case there was a misapprehension in the solicitor's instructions from his client. In the application before the Board there was no such misapprehension on the part of counsel. In our view, the statement of the law which is most appropriate to the circumstances of this application is to be found in a decision of the English Court of Appeal where Banks, L. J., stated in *Shepherd v. Robinson* [1919] 1 K.B. 474 at page 477:

It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it; and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Court.

In another decision of the British Columbia Court of Appeal in *Propp et al. v. Fleming* (1968), 67 D.L.R. (2d) 630, the Court followed *Shepherd v. Robinson* where a compromise of a legal action had been accepted by a solicitor even though his client had not instructed him to accept the compromise. The Court noted that even if the solicitor had exceeded his authority to settle impliedly granted to him upon the retainer to conduct the litigation, it would not avail the complaining client as there was no suggestion that the other side had notice of the limitation. For the foregoing reasons, the Board finds that the applicants and the respondent have settled the grievance in this application.

18. Having regard to the settlement of the parties and pursuant to section 124 of the *Labour Relations Act*, the Board makes the following determination:

- (i) Nino Blassutta shall be hired to a position with Urban Mechanical Contracting 1979 Ltd. at its project which is located at Spring Garden Avenue in the City of North York. Nino Blassutta shall hold this position for the duration of the period during which his services are required.

- (ii) If, at the end of the period referred to in (i) Urban Mechanical Contracting 1979 Ltd. requires any of its journeymen or members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 ("Local 46"), to be transferred from any other of its residential to its project at Finch and Kenneth Avenue in the City of North York, Nino Blassutta shall be the first employee to be transferred to the project at Finch and Kenneth Avenue in the City of North York providing that he is willing and able to perform the available work.
- (iii) If at the end of the period referred to in (i) Urban Mechanical Contracting 1979 Ltd. determines it must hire new journeymen to perform the work of Local 46 at the project at Finch and Kenneth Avenue in the City of North York, Nino Blassutta shall be offered a position on the said project provided that he has not obtained another position of employment and provided that he is willing and able to perform the available work.
- (iv) Urban Mechanical Contracting 1979 Ltd. shall forthwith pay to Nino Blassutta wages and benefits that he would have been entitled to if he had been employed by Urban Mechanical Contracting 1979 Ltd. from September 30, 1983.

19. The Board remains seized with this application in the event any issue arises with respect to its implementation.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1983

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1619-82-R: Schneiders Office Employees Association Ontario, (Applicant) v. J. M. Schneider Inc. and Link Services Inc., (Respondents) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in the City of Kitchener save and except supervisors, persons above the rank of supervisor, executive secretaries, secretary to the Director of Personnel, technologists and technicians, senior financial analyst, senior costs analyst, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, students employed in a co-operative training program and persons covered by subsisting collective agreements." (245 employees in unit).

0183-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Shar-Dee Contracting Limited, (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0581-83-R: Ontario Public Service Employees Union, (Applicant) v. Windsor Roman Catholic Separate School Board, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, save and except co-ordinator/student services, curriculum materials consultant, persons above such rank, and persons covered by subsisting collective agreements." (11 employees in unit). (*Clarity Note*).

0611-83-R: Canadian Union of Public Employees, (Applicant) v. The University Students' Council of the University of Western Ontario, (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except members of the Student Council, members of the Board of Directors, president, controller, ombudsman, executive assistant to the president, Student Police Force, manager of the Spoke N' Rim, unigraphics manager, programme co-ordinator, manager of The Gazette Advertising Bureau, manager Central Box Office, and persons regularly employed for not more than 24 hours per week." (20 employees in unit). (*Having regard to the agreement of the parties*).

0646-83-R: International Ladies' Garment Workers' Union, (Applicant) v. Vogue Brassiere Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Cambridge, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, mechanics, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (133 employees in unit). (*Having regard to the agreement of the parties*).

0775-83-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. Bestview Holdings Limited, (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit: "all employees of the respondent at its nursing home at 95 Humber College Boulevard, in the Municipality of Metropolitan Toronto, save and except registered nurses, and graduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff." (45 employees in unit). (*Having regard to the agreement of the parties*).

0776-83-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. Bestview Holdings Limited, (Respondent).

Unit: "all employees of the respondent at its nursing home at 95 Humber College Boulevard, in the Municipality of Metropolitan Toronto, save and except registered nurses, and graduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff." (15 employees in unit). (*Having regard to the agreement parties*).

1088-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Chatham Plastic Finishing, 397571 Ontario Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Chatham, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (74 employees in unit). (*Having regard to the agreement of the parties*).

1134-83-R: Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. Bestview Holdings Limited, (Respondent).

Unit: "all employees of the respondent at its nursing home at 95 Humber College Boulevard, in the Municipality of Metropolitan Toronto, save and except registered nurses, and graduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

1156-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2466, (Applicant) v. Carolific Construction Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1184-83-R: Teamsters Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Kelsey-Hayes Canada Ltd., Windsor Division, (Respondent).

Unit: "all employees of the respondent in the City of Windsor, Ontario, save and except chief engineer and foremen, persons above the rank of chief engineer and foreman, office, clerical and sales staff and persons covered by subsisting collective agreements." (8 employees in unit). (*Having regard to the agreement of the parties*).

1209-83-R: Seafarers International Union of Canada, A.F.L., C.I.O., C.L.C., (Applicant) v. Jerry Newman and Son Ltd., N. T. & T. Inc., carrying on business as Newman Harbour Terminals and Transportation Inc., Lakespan Shipping Inc., Lakespan Marine Inc., and Contrast Shipping Line Ltd., (Respondents).

Unit: “all persons employed by Contrast Shipping Line Ltd. as unlicensed personnel on the M/V Caribbean Trailer sailing between Windsor and Thunder Bay.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1319-83-R: The Employees Association of St. Lawrence and District Ambulance Services, (Applicant) v. St. Lawrence & District Ambulance Services operated by 520212 Ontario Limited, (Respondent).

Unit: “all employees of the respondent working at its Ambulance bases in and out of the communities of Morrisburg, Prescott, Kemptville, Winchester and Casselman, all of which are in the Province of Ontario, save and except supervisors, those above the rank of supervisor, office staff and students employed during the school vacation period.” (34 employees in unit). (*Having regard to the agreement of the parties*).

1337-83-R: Service Employees Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Bright Spot Restaurant & Bowling Alleys, (Respondents) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Brighton Township, save and except bookkeeper, accountant, general manager and persons above the rank of general manager.” (9 employees in unit). (*Having regard to the agreement of the parties*).

1343-83-R: Canadian Transportation Workers Union No. 188, National Council of Canadian Labour, (Applicant) v. Thompson Transport Limited, (Respondent).

Unit: “all employees of the respondent in the City of St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and persons covered by subsisting collective agreements.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1371-83-R: United Food and Commercial Workers International Union Local 1105 P, (Applicant) v. Galco Food Products Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, regularly employed for not more than 24 hours per week, save and except foremen, persons above the rank of foreman, office and sales staff.” (13 employees in unit). (*Having regard to the agreement of the parties*).

1375-83-R: Amalgamated Clothing and Textile Workers Union - Toronto Joint Board, (Applicant) v. Tiny Tots Knitting Mills Inc., (Respondent).

Unit: “all employees of the respondent at its plant in the City of Hamilton, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, designers, office and sales staff, homeworkers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (40 employees in unit). (*Having regard to the agreement of the parties*).

1387-83-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Peel Condominium Corporation No. 95, (Respondent).

Unit: “all employees of the respondent at 966 Inverhouse Drive at Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1389-83-R: Ontario Public Service Employees Union, (Applicant) v. Oshawa General Hospital, (Respondent).

Unit: “all technologists, phlebotomy technicians and laboratory assistants employed in Medical Laboratories, and all pharmacy assistants employed in the Pharmacy of the Respondent at Oshawa, Ontario,

regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Chief Technologists, Pharmacists, persons above the rank of Chief Technologist and Pharmacist, and persons covered by subsisting collective agreements.” (28 employees in unit). (*Having regard to the agreement of the parties*).

1391-83-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Flanagan Warehousing & Distributing Co. Ltd., (Respondent).

Unit: “all employees of the respondent in the City of Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (2 employees in unit). (*Having regard to the agreement of the parties*).

1394-83-R: Teamsters Local Union No. 1000, Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Amstel Brewery Canada Limited, (Respondent).

Unit: “all employees of the respondent in the City of Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff and persons covered by subsisting collective agreements.” (2 employees in unit). (*Having regard to the agreement of the parties*).

1408-83-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Boyne Valley Cons. Co., (Respondent).

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1409-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. 529486 Ontario Limited, (Respondent).

Unit: “all employees of the respondent employed at the Sheridan Inn, St. Thomas, Ontario, save and except assistant manager, persons above the rank of assistant manager, accountant and head chef.” (41 employees in unit). (*Having regard to the agreement of the parties*).

1438-83-R: Local #1 Ontario – International Union of Bricklayers & Allied Craftsmen, (Applicant) v. Peter Kapps Masonry Contractors, Division of 493382 Ontario Limited, (Respondent).

Unit #1: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in unit).

1472-83-R: United Brotherhood of Carpenters & Joiners of America, Local 1256, (Applicant) v. De Jong Construction, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1473-83-R: International Woodworkers of America, (Applicant) v. G. W. Martin Forest Products Limited, (Respondent).

Unit: "all employees of the respondent at Alban, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

1482-83-R: International Union of Operating Engineers, Local 796, (Applicant) v. Olympia & York Developments Limited, (Respondent).

Unit: "all mechanical maintenance employees of the respondent engaged in maintenance services and plant operations at the Exchange Tower Building in the Municipality of Metropolitan Toronto, Ontario, save and except assistant superintendent, persons above the rank of assistant superintendent, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

1493-83-R: Retail Clerks Union, Local 1977, (Applicant) v. Zehrs Markets, a Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent at its retail store at Glenridge Centre, 315 Lincoln Road, Waterloo, Ontario, save and except the store manager and persons above the rank of store manager." (83 employees in unit). (*Having regard to the agreement of the parties*).

1505-83-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Les Entreprises Julien Inc., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1538-83-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Ottawa Door Consultants Ltd., (Respondent).

Unit #1: "all sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

Unit #2: "all sheet metal workers and registered sheet metal apprentices of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

1547-83-R: Retail Clerks Union, Local 1977 Chartered by the United Food and Commercial Workers International Union, CLC AFL-CIO, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondents).

Unit: "all employees of the respondent at its retail store in Wingham, Ontario, save and except store manager and persons above the rank of store manager." (41 employees in unit). (*Having regard to the agreement of the parties*).

1548-83-R: United Food & Commercial Workers International Union, (Applicant) v. Dresden Industrial Company, (Respondent).

Unit: "all employees of the respondent at St. Mary's, Ontario, save and except foremen, persons above the rank of foreman, office and outside sales staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

1555-83-R: Service Employees Union, Local 663, A.F.L., C.I.O., C.L.C., (Applicant) v. Trenton Memorial Hospital, (Respondent).

Unit: "all office and clerical employees regularly employed for not more than 24 hours per week and students employed during the school vacation period by the respondent in Trenton, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, chief engineer, personnel assistant, secretary to the administrator, secretary to the assistant administrator, secretary to the assistant administrator of patient services, secretary to director of nursing, secretary to the director of personnel, secretary to the director of finance, supervisors, foreman, persons above the rank of supervisor or foreman and persons covered by subsisting collective agreements." (18 employees in unit). (*Having regard to the agreement of the parties*).

BARGAINING AGENTS CERTIFIED SUBSEQUENT TO A PRE-HEARING VOTE

0870-83-R: Local 2228, International Brotherhood of Electrical Workers, (Applicant) v. Filtran Limited, (Respondent).

Unit: "all employees of the respondent in Nepean, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period." (107 employees in unit).

Number of names of persons on revised voters' list		107
Number of persons who cast ballots	103	
Number of ballots marked in favour of applicant		51
Number of ballots marked against applicant		46
Ballots segregated and not counted		6

1296-83-R: Canadian Union of Public Employees, (Applicant) v. 56 Stefan 82 Limited, carrying on business as Sidbrook Private Hospital, (Respondent).

Unit: "all employees of the respondent in Cobourg, Ontario, save and except Professional Medical Staff, Registered and Graduate Nurses, Supervisors, persons above the rank of Supervisor, and persons covered by subsisting collective agreement." (29 employees in unit).

Number of names of persons on revised voters' list		30
Number of persons who cast ballots	26	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		8

Bargaining Agents Certified Subsequent to a Post Hearing Vote

0754-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. 470469 Ontario Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at its Golden Griddle Restaurant, 45 Carlton Street in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		11

Unit #2: (*See Applications for Certification Dismissed – No Vote Conducted*).

1056-83-R: Canadian Union of Public Employees, (Applicant) v. Stratford General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all employees of the respondent in Stratford, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foreladies/men and persons of equal or higher rank, office and clerical staff, registered and graduate nurses, student nurses in training, medical staff, paramedical employees and students employed through cooperative training programs or work experience programs with a university or community college and persons covered by subsisting collective agreements. (125 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		121
Number of persons who cast ballots	76	
Number of ballots marked in favour of applicant		53
Number of ballots marked against applicant		22
Ballots segregated and not counted		1

Applications for Certification Dismissed – No Vote Conducted

0754-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. 470469 Ontario Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified Subsequent to a Post Hearing Vote*).

Unit #2: "all employees of the respondent at its Golden Griddle Restaurant, 45 Carlton Street in the Municipality of Metropolitan Toronto, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, those above the rank of supervisor, and office staff." (23 employees in unit).

0875-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Ormersher Decor 1980 Limited, (Respondent). (6 employees in unit).

1355-83-R: Canadian Union of Public Employees, (Applicant) v. Brockville General Hospital, (Respondent). (66 employees in unit).

1358-83-R: Teamsters Local Union No. 1000, Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Barnes Wines Limited, (Respondent). (4 employees in unit).

Applications for Certification Dismissed Subsequent to a Post Hearing Vote

1138-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Matthews Group Limited, (Respondent) V. Labourers' International Union of North America and Labourers International Union of North America, Ontario Provincial District Council, (Intervener #1) v. Labourers' International Union of North America, Local 607, (Intervener #2)

Unit: "all carpenters and carpenters' apprentices in the employ of Matthews Group Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the District of Kenora, including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

Number of names of persons on list as originally prepared		9
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of intervener #2		6

0197-83-R: United Food and Commercial Workers' International Union, Local 175, (Applicant) v. Canadian Pizza Co. Ltd., (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (109 employees in unit).

Number of names of persons on revised voters' list		90
Number of persons who cast ballots	92	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		41
Number of ballots marked against applicant		44
Ballots segregated and not counted		6

0521-83-R: Food and Service Workers of Canada, (Applicant) v. Chrysalis Restaurant Enterprises Inc., (Respondent).

Unit: "all employees employed by the respondent in its Hazelton Lanes restaurants in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, chefs who exercise managerial functions, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (92 employees in unit).

Number of names of persons on revised voters' list		61
Number of persons who cast ballots	59	
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		28
Ballots segregated and not counted		10

0824-83-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Donald J. McRae Contracting Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and

institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Number of persons on list as originally prepared		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		3

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0800-83-R; 0801-83-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 461, (Applicant) v. Shaw Festival Theatre Foundation, Canada, (Respondent).

0840-83-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 461, (Applicant) v. Shaw Festival Theatre Foundation, Canada, (Respondent) v. Employees, (Objectors).

0845-83-R: Labourers’ International Union of North America, Local 1267, (Applicant) v. Peel Truck & Trailer Equipment Limited, (Respondent).

1185-83-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters’ and Joiners of America, (Applicant) v. Central Forming and Concrete Inc., (Respondent).

1362-83-R: United Plant Guard Workers of America, Local 1958, (Applicant) v. Welles Corporation Ltd., (Windsor, Ont.), (Respondent).

1390-83-R: Labourers’ International Union of North America, Local 247, (Applicant) v. Grenville Christian College, (Respondent).

1426-83-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Wheelwright Concrete & Drain Limited, (Respondent).

1493-83-R: Health, Office & Professional Employees, division of Local 206 Retail, Commercial & Industrial Union, Chartered by the United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. North Park Nursing Home, (Respondent).

1499-83-R: Service Employees Union, Local 183, (Applicant) v. Belleville General Hospital, (Respondent).

1533-83-R: I.A.T.S.E. Local 105, (Applicant) v. Premier Operating Corporation Limited, (Respondent).

1553-83-R: Labourers’ International Union of North America, Local 183, (Applicant) v. F. Ferri Carpenters, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1464-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Matthews Group Limited and Greg’s Diving Services Limited, (Respondents). (*Withdrawn*).

0353-83-R: Carpenters District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Stephen Sura (Canada) Ltd., Stephen Sura Inc., (Respondents). (*Dismissed*).

1392-83-R: International Woodworkers of America, (Applicant) v. John Drautworst Furniture Limited, and Rebu'H Furniture (1983) Inc., (Respondents). (*Granted*).

1596-83-R: Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Mastercraft Bridge and Engineering Construction (Ottawa) Limited, (Respondent). (*Withdrawn*).

SALE OF A BUSINESS

1723-82-R: London & District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Price Waterhouse Limited and Canadian Imperial Bank of Commerce, (Respondents). (*Dismissed*).

0349-83-R: Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. James River-Marathon Ltd., Pic River Forest Products Inc., Buchanan Forest Products Limited, (Respondents). (*Dismissed*).

1569-83-R: ACLO Computers Inc., (Applicant) v. The Energy and Chemical Workers' Union, Local 803, (Respondent) v. United Steelworkers of America and its Local 8716, (Intervener). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1336-82-R: Nishan Atikin, (Applicant) v. International Association of Machinists and Aerospace Workers (District Lodge 78), (Respondent). (81 employees in unit). (*Terminated*).

0497-83-R: Denis Mutchmore, (Applicant) v. Commercial Workers Union Local 486, (Respondent) v. General Bearing Service Inc., (Respondent).

Unit: "all salaried employees working in Ottawa, Ontario, all of whom are covered by the present Agreement with the exception of: (a) the Assitant Store Manager and all other personnel of a rank superior to Assistant Store Manager; (b) outside salesmen; (c) the Accountant; (d) the Office Manager; (e) the principal operator of teh computer; (f) all personnel who are involved with the programming of the computer; (g) the personal secretary (executive secretary); (h) students. Part-time wage earners are defined as those who work twenty-four (24) hours or less per week." (18 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		15
Number of persons who cast ballots	14	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		14

0993-83-R: Mary L. Mendes, (Applicant) v. Service Employees Union, Local 204, (Respondent) v. K Mart Canada Limited, (Intervener).

Unit: "all employees of K Mart Canada Limited employed at K Mart Store 5417, located at Bayview Village Shopping Centre in the Municipality of Toronto who are regularly employed for not more than 24 hours per week or who are employed as students during the school vacation period." (70 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		67
Number of persons who cast ballots	49	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		44

1187-83-R: Wayne Aultman, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent). (1 employee in unit). (*Dismissed*).

1242-83-R: Steve Rath, (Applicant) v. Teamsters Union, Local 141, (Respondent) v. Inter City Papers, (Intervener). (14 employees in unit). (*Dismissed*).

1294-83-R: Phyllis Fitzgerald and Joanne Greehy, (Applicant) v. International Beverage Dispensers' and Bartenders' Union, Local 280, (Respondent) v. Elm Grove Tavern, (Intervener). (2 employees in unit). (*Dismissed*).

1412-83-R: John Erdman - Employee of Industrial Fabricators Division of 395660 Ontario, Limited, (Applicant) v. Millworkers Union Local 802, United Brotherhood of Carpenters & Joiners of America, (Respondent). (5 employees in unit). (*Withdrawn*).

1556-83-R: Emillio Campea and Geoge Ohman, (Applicants) v. United Steelworkers of America, (Respondent).

Unit: "all employees of Armstrong & Jones Ltd., in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and technical personnel." (4 employees in unit). (*Terminated*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1486-83-U: Stearns Catalytic Ltd. formerly carrying on business as Catalytic Enterprises Ltd., (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and its Local 663, International Brotherhood of Electrical Workers and its Local 530, William Robb, Fraser Collins et al, (Respondents). (*Withdrawn*).

1535-83-U: Brewers' Warehousing Company Limited, (Applicant) v. Those Persons Named in Schedule "A" to This Application, the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, C.L.C., its Local Union 326 and its United Brewery Warehousing Workers' Provincial Board, (Respondents). (*Granted*).

1681-83-U: Howarth & Smith Limited, Carswell Printing Company, (Applicants) v. Graphic Communications Int'l U.L. 28B, Persons Listed on schedules 1-3, (Respondents). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1296-82-U: Luciano D'Alessandro, Donato Marinaro and Robert J. S. Countryman, (Complainant) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, (Respondents). (*Dismissed*).

1665-82-U: Daniel John McHenry, (Complainant) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, (Respondent). (*Withdrawn*).

1305-83-U: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Complainant) v. Matthews Group Limited and Labourers' International Union of North America, Local 607, (Respondents). (*Withdrawn*).

2329-82-U: Labourers' International Union of North America, Ontario Provincial District Council, (Complainant) v. Labourers' International Union of North America, Local 506, Michael Gargaro, Geoffrey Kinney, Brian Foote, Robert Rae, Alfred Wood, Nicholas Barbieri, Anthony Neil and Peter Hitchen as Trustees of the Labourers' International Union, Local 506 Administration Fund,

RMT Employee Benefit Plan Consultants Limited,

General Contractors Section of the Toronto Construction Association, on its own behalf and on behalf of all employers of employees represented by the Labourers' International Union of North America, Local 506 in the Industrial, Commercial and Institutional sector of the Construction Industry in O.L.R.B. geographic areas #8 and #18,

Employer Bargaining Agency – Labourers, on its own behalf of all employers of employees represented by the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council and their affiliated bargaining agents in the Industrial, Commercial and Institutional sector of the Construction Industry in the Province of Ontario, (Respondents) v. Labourers' International Union of North America, (Intervener). (*Withdrawn*).

2382-82-U: Marin Bros., G. Uzelac, A. Levin, C. Panuci et al, (Complainants) v. Dufferin Aggregates, A Division of St. Lawrence Cement Inc., and Torres Transport Limited and Nick Torres, (Respondent) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, (Intervener). (*Terminated*).

0052-83-U: Labourers' International Union of North America, Local 506, (Complainant) v. Verdi Formint Limited, The Ontario Formwork Association, Labourers' International Union of North America, Local 183, Rampart Enterprises Limited, Metro Toronto Apartment Builders Association, (Respondents) v. The Formwork Council of Ontario, (Intervener). (*Dismissed*).

0195-83-U: Luciano D'Alessandro, Donato Marinaro and Robert J. S. Countryman, (Complainant) v. Labourers' International Union of North America, Local 11089, and Rocco D'Andrea, (Respondents). (*Dismissed*).

0198-83-U: United Food and Commercial Workers' International Union, Local 175, (Complainant) v. Canadian Pizza Co. Ltd., (Respondent). (*Withdrawn*).

0323-83-U: Luciano D'Alessandro, Donato Marinaro and Robert J. S. Countryman, (Complainant) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, (Respondents). (*Dismissed*).

0458-83-U: Tom Norton and the Professional and Clerical Workers of Canada, (Complainants) v. The Canadian Union of Operating Engineers and General Workers and its Local 111 and Robert Whissell, (Respondents). (*Dismissed*).

0587-83-U: Battista DeRose and John St. Pierre, (Complainants) v. John Sarich, Local 2251 United Steelworkers of America, (Respondent). (*Dismissed*).

0605-83-U: Lloyd Carter, (Complainant) v. United Steelworkers of America, Local 7024, (Respondent). (*Withdrawn*).

0632-83-U: Paul Atkinson and Edelmiro Vidal, (Complainants) v. Retail, Wholesale and Department Store Union, Local 414 and The Great Atlantic and Pacific Company, Limited, (Respondents). (*Dismissed*).

0760-83-U: Labourer's International Union Local 1089, et al, (Repspondents). (*Withdrawn*).

0812-83-U: Mohammed Qureshi, (Complainant) v. Bill Poullos, Wolfgang Kurtz, Danny Brown, Union Officials of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 458, (Respondents) v. Gareth Davies, (Intervener #1) v. Gary Gambacourt, (Intervener #2). (*Dismissed*).

0836-83-U: Ontario Nurses' Association, (Complainant) v. Kingston General Hospital, (Respondent). (*Dismissed*).

0849-83-U: C.L.C. Local 354, Can Workers' Union, (Complainant) v. American Can Canada Inc., (Respondent). (*Dismissed*).

0850-83-U: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 597, (Complainant) v. C. E. Lummus Canada Ltd., (Respondent) v. Labour Relations Bureau of the Ontario General Contractors Association, (Intervener). (*Granted*).

0883-83-U: United Food and Commercial Workers International Union, (Complainant) v. Zymaize Company, (Respondent). (*Withdrawn*).

0911-83-U: Giulio Benini, (Complainant) v. Labourer's International Union Local 1089, et al, (Respondents). (*Withdrawn*).

0948-83-U: James Raymond Bennett, (Complainant) v. Teamsters Union, Local 230, (Respondent) v. Canada Building Materials, (Intervener). (*Dismissed*).

0972-83-U: Tak Kunitomo, (Complainant) v. United Steelworkers of America, (Respondent) v. Kelson Spring Products Limited, (Intervener). (*Withdrawn*).

0983-83-U: Erminio Bollella, (Complainant) v. U.A.W., C.L.C., and Local Union 525, Stoney Creek, Ontario, (Respondent). (*Withdrawn*).

1008-83-U: The United Brotherhood of Carpenters and Joiners of America, Local 2041, (Complainant) v. Nation Drywall Contractors Ltd., (Respondent). (*Withdrawn*).

1058-83-U: Health, Office & Professional Employees Division of Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Complainant) v. Quinty Beach Nursing Home, (Respondent). (*Withdrawn*).

1059-83-U: Normand Larocque, (Complainant) v. Labourers' International Union Local 1089, et al, (Respondents). (*Withdrawn*).

1084-83-U: Ronald Neathway, (Complainant) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, (Respondent). (*Withdrawn*).

1137-83-U: Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial Workers International Union, (Complainant) v. Quinty Beach Nursing Home, (Respondent). (*Withdrawn*).

- 1138-83-U:** International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Chatham Plastics Finishers 397571 Ontario Limited, (Respondent). (*Withdrawn*).
- 1148-83-U:** Labourers' International Union of North America, Local 1267, (Complainant) v. Peel Truck & Trailer Equipment Limited, (Respondent). (*Withdrawn*).
- 1153-83-U:** Edward Divers, (Complainant) v. Westinghouse Canada Inc., (Respondent). (*Dismissed*).
- 1165-83-U:** Raymond Daviau, (Complainant) v. United Food & Commercial Workers, (Respondent) v. Canadian Dressed Meats Ltd., (Intervener). (*Dismissed*).
- 1181-83-U:** Barrington Morrison, (Complainant) v. Weldo Plastics Limited, and International Leather Goods, Plastics and Novelty Workers Union, Local 8, (Respondent). (*Dismissed*).
- 1204-83-U:** Ontario Nurses' Association, (Complainant) v. Corporation of the City of Thunder Bay, (Respondent). (*Granted*).
- 1205-83-U:** Susan E. Ellis, (Complainant) v. The United Steelworkers of America, (Respondent). (*Dismissed*).
- 1211-83-U:** United Steelworkers of America, (Complainant) v. Liberato Petti, Herbert Clark et al, (Respondent) v. Lilo Rail of Canada Limited and Modern Plating Limited, (Intervener). (*Withdrawn*).
- 1219-83-U:** United Garment Workers of America, (Complainant) v. Cumberland Clothing Limited, (Respondent). (*Withdrawn*).
- 1233-83-U:** Domenico G. Vetro, (Complainant) v. United Electrical Radio & Machine Workers (U.E.) Local 507, (Respondent). (*Withdrawn*).
- 1265-83-U:** Daniel Arsenault, (Complainant) v. Glendale Memorial Gardens, (Respondent). (*Withdrawn*).
- 1267-83-U:** Martha Carias, (Complainant) v. United Steelworkers of America, Local 8059, (Respondent). (*Withdrawn*).
- 1268-83-U:** Idalina Cameirao, (Complainant) v. United Steelworkers of America, Local 8059, (Respondent). (*Withdrawn*).
- 1269-83-U:** Narcisa Imbaquingo, (Complainant) v. United Steelworkers of America, Local 8059, (Respondent). (*Withdrawn*).
- 1276-83-U:** Labourers' International Union of North America, Local 1267, (Complainant) v. Peel Truck & Trailer Equipment Limited, (Respondent). (*Withdrawn*).
- 1287-83-U:** International Union of Operating Engineers, Local 793, (Complainant) v. Campbell Red Lake Mines Limited, (Respondent). (*Dismissed*).
- 1291-83-U:** United Food and Commercial Workers International Union, Local 1000A, (Complainant) v. Jack Colden Limited, (Respondent). (*Withdrawn*).
- 1301-83-U:** Canadian Union of Public Employees, (Complainant) v. Centro-Clinton Day Care Centre, (Respondent). (*Withdrawn*).

1308-83-U: Michael Pantazopoulos, (Complainant) v. United Steelworkers of America, Local 4215, (Respondent) v. Liberty Furniture Industries Limited, (Intervener). (*Dismissed*).

1316-83-U: Gerald John Thomas Pearson, (Complainant) v. Lakespan Shipping, N. T. & T. Inc. and Contrast Shipping and Terramar, (Respondents). (*Dismissed*).

1324-83-U: Bakery, Confectionery and Tobacco Workers International Union, (Complainant) v. Rex Pak Ltd, (Respondent). (*Withdrawn*).

1325-83-U: The United Brotherhood of Carpenters and Joiners of America, Local 2041, (Complainant) v. Concordia Management Company Limited, (Respondent) v. Nation Drywall Contractors Ltd., (Intervener). (*Withdrawn*).

1351-83-U: International Union of Operating Engineers, Local 793, (Complainant) v. George Wimpey Canada Limited, (Respondent). (*Withdrawn*).

1359-83-U: Alliance Employees' Union, (Complainant) v. Taxation Component, (Respondent). (*Withdrawn*).

1367-83-U: William Shaver, (Complainant) v. Lakespan Shipping, N. T. & T. Inc., Contrast Shipping and Terramar, (Respondents). (*Dismissed*).

1369-83-U: United Food and Commercial Workers International Union, (Complainant) v. P. & H. Foods Division of Parrish & Heimbecker Limited, (Respondent). (*Withdrawn*).

1377-83-U: Steve Mokej, (Complainant) v. Frankel Steel Limited, (Respondent). (*Withdrawn*).

1393-83-U: International Woodworkers of America, (Complainant) v. John Drautwurst Furniture Ltd.; Rebu'H Furniture 1983 Company Limited, (Respondent). (*Withdrawn*).

1395-83-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Artek Door Industries Ltd., (Respondent). (*Withdrawn*).

1396-83-U: Food and Service Workers of Canada, (Complainant) v. Bond Place Hotel, (Respondent). (*Withdrawn*).

1397-83-U: United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. DY 4 Systems Inc., (Respondent). (*Withdrawn*).

1414-83-U: Michael Richard Broaderick, (Complainant) v. Teamsters Local Union 419, (Respondent). (*Withdrawn*).

1423-83-U: United Food and Commercial Workers' International Union Local 725, (Complainant) v. 505894 Ontario Limited operating as Malarky's, (Respondent). (*Withdrawn*).

1434-83-U: Service Employees Union, Local 183, AFL, CIO, CLC, (Complainant) v. Bright Spot Restaurant & Bowling Alleys, Toney Alebeek and Debbie Alebeek, (Respondents). (*Withdrawn*).

1464-83-U: Steve Mokej, (Complainant) v. International Association of Bridge, Structural and Ornamental Iron Workers, (Respondent). (*Withdrawn*).

1475-83-U: John Muchair, (Complainant) v. Frank Lariviere, (Respondent). (*Withdrawn*).

1514-83-U: Graphic Communications Union Local No. N62, (Complainant) v. Mutual Press Limited and Robert Belanger, (Respondent). (*Withdrawn*).

1515-83-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Louis Finelstein (Member of Ottawa Owners and Brokers Association), (Respondent). (*Withdrawn*).

1546-83-U: The Ontario Produce Company, The Oshawa Food Division of The Oshawa Group Limited, (Complainant) v. Louis Bonello, (Respondent). (*Granted*).

JURISDICTIONAL DISPUTES

2409-82-JD: E. S. Fox Limited, (Complainant) v. Labourers' International Union of North America, Local 247, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0618-83-M: Kingston Technicians Union, Local 254, (Applicant) v. Queen's University, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0454-83-OH: Robert Zizek, (Complainant) v. Wilco Canada Inc., (Respondent). (*Granted*).

1210-83-OH: William Terry, (Complainant) v. Church of the Epiphany, (per John McCormack), (Respondent). (*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCE

0903-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. Alnor Earthmoving Limited, (Respondent) v. Operating Engineers Employer Bargaining Agency, (Intervener). (*Granted*).

0859-82-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. York Lathing & Drywall Ltd. (Respondent). (*Withdrawn*).

1708-82-M; 1709-82-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Contra Construction Limited and Trent Masonry Ltd. and Arthur Berghout, carrying on business under the name and style of Arend Construction, (Respondents). (*Granted*).

2199-82-M: Labourers' International Union of North America, Local 247, (Applicant) v. E. S. Fox Limited, (Respondent). (*Withdrawn*).

2687-82-M: Ontario Allied Construction Trades Council, Laborers' International Union of North America, Local 597, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Dismissed*).

2751-82-M: Sheet Metal Workers International Association Local Union 537, (Applicant) v. Blenkhorn & Sawle Ltd., (Respondent). (*Dismissed*).

0400-83-M: Carpenters District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Stephen Sura (Canada) Ltd., Stephen Sura Inc., (Respondents). (*Dismissed*).

0780-83-M: The International Union of Bricklayers and Allied Craftsmen, Local 28, (Applicant) v. Tilechem Ltd., (Respondent). (*Withdrawn*).

0820-83-M: SN/FW Ltd., (Applicant) v. Local Union 128 International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, (Respondent). (*Dismissed*).

1007-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Nation Drywall Contractors Ltd., (Respondent). (*Withdrawn*).

1151-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. The Corporation of the Town of Keewatin, (Respondent). (*Withdrawn*).

1178-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. 480320 Ontario Inc. carrying on business as Creative Carpentry, (Respondent). (*Granted*).

1260-83-M: Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Mastercraft Bridge and Engineering Construction (Ottawa) Limited, (Respondent). (*Withdrawn*).

1272-83-M: Labourers' International Union of North America, Local 1036, (Applicant) v. Laurentian Masonry Limited, (Respondent). (*Terminated*).

1303-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. National Caterers Limited, (Respondent). (*Withdrawn*).

1327-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Unions 700 and 736, (Applicant) v. Dietrich Steel Ltd., (Respondent). (*Granted*).

1328-83-M; 1329-83-M: Resilient Floorworkers, Local 2965, (Applicant) v. Zeppa Tile Inc., (Respondent). (*Withdrawn*).

1331-83-M: Resilient Floorworkers, Local 1965, (Applicant) v. Ernie Keis Floor Coverings Ltd., (Respondent). (*Withdrawn*).

1332-83-M: Resilient Floorworkers, Local 2965, (Applicant) v. Aldershot Flooring Ltd., (Respondent). (*Withdrawn*).

1345-83-M: The Formwork Council of Ontario, (Applicant) v. Kamet Enterprises Ltd., (Respondent). (*Withdrawn*).

1353-83-M: Labourers International Union of North America, Local 607, (Applicant) v. National Caterers Ltd., (Respondent). (*Withdrawn*).

1354-83-M: Local 50, International Union of Elevator Constructors, (Applicant) v. Ajax Elevator Limited, (Respondent). (*Granted*).

1403-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Richardson Mechanical and Millwrighting Inc., (Respondent). (*Granted*).

1407-83-M: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Canal Electric a Division of Upper Lakes Shipping Ltd., (Respondent). (*Withdrawn*).

1430-83-M: Labourers International Union of North America, Local 493, (Applicant) v. G.M. Gest Inc., (Respondent). (*Withdrawn*).

1433-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Richardson Mechanical and Millwrighting Inc., (Respondent). (*Granted*).

1442-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Linrin Forming Limited, (Respondent). (*Withdrawn*).

1444-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Antinori Building Contractor Inc., (Respondent). (*Withdrawn*).

1445-83-M: Labourers' International Union of North America, Local 527, (Applicant) v. Bulwark Construction Limited, (Respondent). (*Withdrawn*).

1446-83-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. A. Barei Construction Ltd., (Respondent). (*Granted*).

1447-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Duguay Contracting, (Respondent). (*Withdrawn*).

1459-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Korban Inc., (Respondent). (*Granted*).

1461-83-M: Construction Workers Local 53, CLAC, (Applicant) v. C.F.A. Operations Inc., (Respondent). (*Withdrawn*).

1468-83-M: Drywall, Acoustic, Lathing and Insulation Local 675, of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. D. Azzolin Plastering & Drywall, (Respondent). (*Withdrawn*).

1469-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Alden Interiors, (Respondents). (*Withdrawn*).

1479-83-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Star Tile Centre Limited, (Respondent). (*Withdrawn*).

1491-83-M: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Central Forming and Concrete Inc., (Respondent) v. Labourers' International Union of North America, Local 506, (Intervener) v. General Contractors Section of the Toronto Construction Association, (Interested Party). (*Withdrawn*).

1494-83-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Niagara Drywall Ltd., (Respondent). (*Withdrawn*).

1508-83-M: Labourers' International Union of North America, Local 597, (Applicant) v. Global Demolition Ltd., (Respondent). (*Withdrawn*).

1512-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Parkburn Construction Ltd., (Respondent). (*Withdrawn*).

1530-83-M: Ontario Allied Construction Trades Council, Canadian Conference of Teamsters Local 230, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Withdrawn*).

1543-83-M: The International Association of Bridge, Structural and Ornamental Ironworkers, Local 786, (Applicant) v. Dominion Bridge Company Limited (AMCA), (Respondent). (*Withdrawn*).

1544-83-M: Labourers' International Union of North America, Local 837, (Applicant) v. Baldasaro and MacGregor Limited, (Respondent). (*Granted*).

1552-83-M: Quality Control Council of Canada, (Applicant) v. Steel Inspection and Testing Ltd., (Respondent). (*Granted*).

1554-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Chex-Ex Excavating Limited, (Respondent). (*Withdrawn*).

1560-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Investments Carpentry, A Division of 399480 Ontario Limited, (Respondent). (*Granted*).

1562-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Craneway Ltd., (Respondent). (*Withdrawn*).

1576-83-M: Christian Labour Association of Canada, (Applicant) v. Maple Engineering and Construction Company Limited, (Respondent). (*Withdrawn*).

1601-83-M: Local 47, Sheet Metal Workers' International Association, (Applicant) v. Gorlan Mechanical Ottawa Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0037-83-U; 0038-83-R: Public Service Alliance of Canada, (Applicant) v. con/ex general contractors Division of 450318 Ontario Ltd., (Respondent). (*Denied*).

0101-83-U: The Public Service Alliance of Canada, (Complainant) v. William Graves, Gordon Johnson and Henry Hof, (Respondents) v. con/ex general contractors Division of 450318 Ontario Ltd., (Intervener). (*Denied*).

0102-83-U: The Public Service Alliance of Canada, (Applicant) v. con/ex general contractors Division of 450318 Ontario Ltd., (Respondent). (*Denied*).

0837-83-R: Local 47 Sheet Metal Workers; International Association, (Applicant) v. Les Toitures Raymond Inc., (Respondent). (*Dismissed*).

RIGHT TO ACCESS

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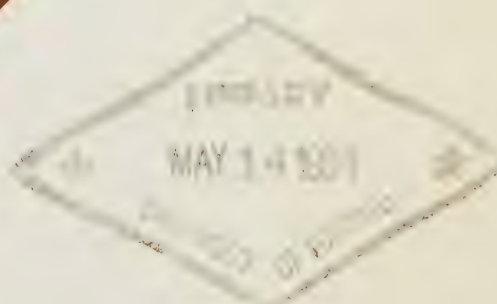
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MAPLE LEAF TAXI COMPANY; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION

0667-83-U Timothy W. Smith and William Morton, Complainants, v. Toronto Joint Board Amalgamated Clothing & Textile Workers Union Local 1414J, Respondent

Duty of Fair Representation – Practice and Procedure – Remedies – Unfair Labour Practice – Union officials mistakenly believing matter settled – Not appearing at hearing – Mistake not reasonable – No de novo hearing – Rectification of seniority provision to detriment of complainants no breach – Wrong advice by union official relied on by complainants adversely affecting seniority rights – Board not distinguishing between degrees of negligence where no explanation from union – Finding prima facie breach and directing full seniority be credited to complainants

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *Tim Smith and William Morton on their own behalf; Paul Cavalluzzo and Jack Matraia for the respondent; Ross Drake for Xerox of Canada Inc.*

DECISION OF THE BOARD; December 19, 1983

I

1. This is a complaint under section 89 of the *Labour Relations Act*. The complainants, Timothy Smith and Bill Morton, contend that they have been dealt with by the respondent trade union contrary to section 68 of the Act. That section reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The complainant was filed on July 28, 1983. In accordance with its usual practice, the Board immediately fixed a date for a hearing, and, at the same time, appointed a Labour Relations Officer to meet with the parties to endeavour to effect a settlement of the matters in dispute between them. On July 5, 1983, copies of the complaint and notice of hearing were served upon the respondent union, and upon Xerox Canada Inc., the complainants' employer. The date fixed for the hearing was July 26, 1983.

3. When this matter came on for a hearing before the Board on July 26, 1983, the complainants appeared in order to support their allegations. No one else appeared. The Board waited for a period of time in order to determine whether the respondent union was simply late in arriving, then, as a matter of courtesy, directed the Labour Relations Officer to attempt to contact the respondent's officials by telephone. Frank Aquino, an organizer and part-time business agent for the respondent, conveyed a message to the Board through the Officer that: he was unaware that the hearing was going to proceed, that he was preparing to go on vacation, that he could not attend the hearing that day, and that he requested an adjournment.

4. That request was vigorously opposed by the complainants. In their submission, the union had proper notice of the complaint and the hearing, the case had not been settled, and

there was no reason or excuse for the union not being there. The complainants argued that the union's response to the Board proceeding showed the same careless indifference that they said they had encountered in their own dealings with the respondent.

5. There being nothing before the Board but the above-mentioned telephone message, the request for an adjournment was denied and the hearing proceeded as scheduled. Mr. Morton and Mr. Smith were the only ones present to give evidence, and that evidence was, of course, neither contradicted nor subject to cross-examination. Some two weeks later the Board received the following letter from counsel for the respondent:

We act as counsel for the Amalgamated Clothing & Textile Workers Local 1414J. We have been advised of the following.

Some time in June 1983, Mr. Smith filed the foregoing complaint. As a result of this Labour Relations Officer David Dunn attended at the union offices at 33 Cecil Street, to deal with the matter. During the discussions with Messrs. Matraia and Aquino he left Board documentation, including a notice of hearing. After some discussions with Mr. Dunn, it was believed by Mr. Matraia that the matter had been settled. He advised Mr. Dunn that the complainant had not filed an appropriate grievance and that he should file a grievance to deal with his complaint. This was subsequently done on July 8th. Because Mr. Matraia felt that the matter had been settled, neither he or Mr. Aquino read the Board documents. Therefore, they did not see the notice of hearing which had been set for July 26th 1983.

The next action upon which my clients were advised of the situation was on the morning of July 26th. This was during the vacation shutdown of the union. Mr. Aquino was called at home on his holidays by Mr. Dunn and advised of the hearing. Mr. Aquino asked for a postponement but apparently this was denied.

In light of these circumstances, on behalf of our client we apologise to the Board for not appearing on July 26th and not defending the case. If at all possible we would seek leave of the Board to re-open the hearing in order to provide a defence which we feel will dispose of the case on its merits. We understand the problem which these circumstances have created. However, our client honestly believed the matter was resolved and as a result did not read the notice of hearing.

If you have any questions or comments concerning this matter please do not hesitate to contact me. To save time we have forwarded a copy of this letter to the complainant Mr. T. Smith.

In view of this letter, the Board scheduled a further hearing to permit the respondent to show cause why the proceeding should be re-opened for the reception of further evidence – in effect, a request for a hearing *de novo*.

6. The second hearing was held on October 20, 1983. This time, the employer appeared, and the union also appeared with counsel and witnesses. The complainants appeared to oppose any re-opening of the matter. The Board heard the evidence of Jack Matraia, the union business agent, and Frank Aquino, both of whom gave an explanation for the union's non-appearance at the first hearing. That explanation follows.

7. Jack Matraia has been manager of the respondent's Toronto Joint Board for about five years. He first learned of the allegations against the union when he was served with the complaint and notice of hearing on or about July 5, 1983; however, according to Matraia he did not look at the documents with which he had been served. There was a brief discussion with the Labour Relations Officer in which they canvassed whether the filing of a grievance might resolve the complainants' concerns, and the Officer indicated that he would put that proposition to the complainants for their consideration. Either that day or the next, Matraia called Ivor Quirola, the president of Local 1414J (the complainants' Local), to discuss the filing of a grievance on the complainants' behalf. Matraia testified that he was assured by Quirola that a grievance would be filed.

8. Some time in the week of July 13th, Matraia made efforts to contact the Labour Relations Officer to determine the status of the outstanding unfair labour practice complaint, but, apparently, he was unable to do so. No efforts were made to speak to any other official of the Board and, in particular, its Registrar, who could have advised Matraia whether or not the matter had, in fact, been settled. Nor was there any effort to contact the complainants prior to the beginning of Matraia's holiday on July 15, 1983. Matraia first learned of the hearing on August 11, 1983, after he had returned from vacation.

9. Matraia concedes that, as an experienced union official, he is generally familiar with the Board's processes – although, as in the present case, the union is typically represented by its lawyers. Over the years he has filed a number of section 89 complaints and is familiar with the settlement process and the role of the Labour Relations Officer. Matraia further concedes that typically such unfair labour practice cases are resolved by a written settlement, usually followed by a Board decision endorsing that settlement or granting leave to withdraw the complaint. Here there was no written settlement, nor even any confirmation that there was a settlement.

10. Matraia's evidence is confirmed by Frank Aquino, who was present when the complaint and the notice of hearing were served. Like Matraia, he did not read the documents, but had the impression that the filing of a grievance would resolve the problem. Aquino testified that he worked for the entire week ending July 22nd and, some time during that week, received a message to call the Labour Relations Officer. Attempts to do so on Thursday, July 21st, were unsuccessful and were not repeated. Again, no effort was made to speak to the Registrar or any other official of the Board, or to contact the complainants. Moreover, prior to going on holiday Aquino received the following memo from Ivor Quirola, dated July 13, 1983:

Grievance 83-15 is filed by Messrs. Tim Smith, Bill Morton and Pat Montoni.

You claim that prior to being transferred from CMC-T to ODC you and the other two members above listed have consulted with the union rep Linda Coltman regarding your seniority status.

The information you received at that time was that company seniority would govern in the event of a layoff and that all that you would be losing by making the transfer would be the opportunity for promotion.

My understanding is you want reinstatement of plant seniority held at CMC-T prior to the transfer to ODC. Furthermore you claim this grievance is put against the union. Considering all the above, my response is as follows:

- a) Based on the facts presented, I do not consider a grievance but an invalid complaint about a misrepresentation by a Union representative.
- b) The Union representative you mentioned was not a Union elected official or an Area Steward representing the Union, therefore I consider that you don't have a valid complaint.
- c) On Art. 6.02 of the Collective Agreement it is clearly stated that Plant seniority for ODC and CMC-T will be treated as separate plants. Therefore when you transfer to ODC, your plant seniority at CMC-T is terminated.
- d) In the event of layoff Plant seniority is the seniority used and not Company seniority as it was suggested by Linda Coltman.

I hope this issue is resolved by my response and explanation, but if you need further explanation please contact me.

11. Whatever else may be taken from this memo, it is clear that, at least at that stage, the complainants' problem was not going to be resolved by a filing of a grievance because the Local union president did not consider this to be warranted. Indeed, Quirola appears to characterize the complainants' allegation as one of "misrepresentation by a union representative" – as in part, it is. Counsel for the union points out that it would have been open to the complainants to appeal Quirola's decision. But no one told the complainants that.

12. Aquino, is a trade union organizer who regularly appears in proceedings before the Board. He too is familiar with section 89 complaints, the way in which they are processed, and the way in which they are usually resolved. Like Matraia he should have known that, failing settlement, there would be a hearing; and the Quirola memo removed the basis for settlement.

13. The union argues that there has been no intention to impede or frustrate the Board's proceedings, nor would there be any substantial prejudice should the Board decide to re-open this case and hear it *de novo*. In the union's submission, its officials have made a *bona fide* mistake, which was compounded by vacation scheduling, and they should not now be denied

the opportunity to put their evidence before the Board. The complainants take the position that the union's submissions do not disclose a sufficient basis for re-opening the hearing and, in effect, canvassing issues which the union had a full opportunity to address had it appeared at the original hearing.

14. I agree with the complainants' position. I do not think it is open to a party properly served with a complaint and notice of hearing to claim that it has made a "*bona fide* mistake", when, on the evidence, its officials did not even bother to read the material with which they were served, let alone consider its implications. Assuming, for the moment, that a plea of "mistake" would be sufficient to justify a new hearing, there must surely be some reasonable basis for it. Here there is none. The union officials concerned are generally familiar with the Board's processes and, had they taken the trouble to read the complaint and notice of hearing, they would have realized that the complaint would proceed to a hearing on July 26th unless it was settled before that. But, not only was there no settlement, there was no reasonable basis for the conclusion that there had been a settlement. No one ever told Matraia or Aquino that the case was settled and they made only minimal efforts to determine the status of the case. It is not for this Board to speculate on what they might have done, but it is apparent that had they contacted the Registrar of the Board, or the complainants, or even considered the memo from Quirola of July 13, 1983, it would have been clear that the case was *not* settled. Yet they did none of these things. If the circumstances of this case were grounds for a hearing *de novo*, no proceeding before the Board would ever be final and the expeditious resolution of applications and complaints would be substantially undermined.

15. For the foregoing reasons then, the request for reconsideration and a re-hearing must be dismissed.

II

16. The complainants' allegations are two-fold:

- a) that the union acted improperly when it renegotiated the terms of the collective agreement so as to remove the contractual basis for a grievance which the complainants had filed;
- b) that the trade union acted improperly when one of its officials advised the complainants that a transfer from one part of the bargaining unit to another would have no, or limited effect on their seniority rights under the collective agreement, when, in fact, the transfer resulted in a forfeiture of their accumulated seniority rights.

It will be convenient to deal with each of these allegations in turn. Such evidence as there was, largely related to the first aspect of the complaint, but, as will become apparent, it is the second allegation which is more troublesome.

17. The complainants, Timothy Smith and William Morton have both been employed by Xerox Canada Inc. for some years. Originally, the company operated a single plant in Mississauga. Its manufacturing division and distribution centre shared the same premises. Some time in 1982, the distribution centre was separated from the manufacturing division and moved to its own premises about five miles away. The two separate plants remain part of a single

bargaining unit, covered by one collective agreement; however, to facilitate administration of that agreement, what was once one local of the Amalgamated Clothing & Textile Workers Union has been divided into two: Local 1414J, covering the manufacturing division, and Local 1414H, covering the distribution centre.

18. In March of 1983, the complainants were working in the distribution centre, but because of a reduction in work were faced with the option of a layoff or a transfer to job openings in the manufacturing division. Not surprisingly, they chose the second option, and transferred to the manufacturing division. That is where they are presently working.

19. The manufacturing division operates on a multiple shift basis, with shifts being allocated on the basis of seniority. Upon a perusal of the collective agreement, the complainants discovered that, in contrast to other sections governing the benefits of seniority, the allocation of preferential shifts was apparently based on *company-wide* seniority. In effect, the complainants could rely upon their total length of service, wherever accumulated, to bid for desirable day shift jobs. That is what they sought to do.

20. When the complainants drew attention to Article 5.13 of the agreement, both the union and the employer expressed surprise. Archie Nesbitt, the president of Local 1414H, and Rod Campbell, the business agent for the two Locals, both told the complainants that the reference to company seniority was a misprint or error which did not reflect the intention of the parties. With the separation of the manufacturing division and the distribution centre, and their relocation in separate premises, the parties had decided that, except for company-wide benefits, there should be separate seniority lists. At the most recent set of negotiations, they had tried to carry this intention into effect, revising the language of the agreement as required. The complainants were told that Article 5.13 had been inadvertently overlooked during this process of revision, and that the allocation of shifts was intended to be based upon the employees' seniority in the manufacturing division only. The complainants do not dispute that this was indeed the case, or that Article 5.13, as written, does not reflect the parties' agreement.

21. Once the anomaly in the collective agreement had been identified, the union scheduled a special meeting so that the members of both locals could discuss the matter. Notice was given and, according to the complainants, the meeting was attended by ninety-five per cent of the membership of both Locals. It might be noted that the membership of Local 1414J, the manufacturing division, is about twice as large as that of Local 1414H, the distribution centre.

22. According to the complainants, the debate at the meeting was active and sometimes heated. The members of Local 1414J were upset about the potential effect of the error since they anticipated more transfers into the bargaining unit (not only from the distribution centre, but perhaps elsewhere) which could upset the established shift distribution. Ivor Quirola, the president of Local 1414J, proposed that the collective agreement be amended to remove the anomaly so that the agreement would read as its drafters intended. The recent transferees into Local 1414J and the members of Local 1414H who might find themselves in that position proposed that the agreement should remain as it was. The complainants, of course, were in the latter group. Archie Nesbitt, the president of Local 1414H, supported their position – not least because the complainants had expressed dissatisfaction about the quality of representation which they had received from him and had warned Rod Campbell, the business agent,

that if their view was not supported they would make a complaint to the Ontario Labour Relations Board.

23. The complainants did not stay for the vote. Sensing that they represented a minority view, they walked out of the meeting together with a number of other members of Local 1414H. They were subsequently advised, as they expected, that the membership had voted to rectify the agreement. They do not suggest either that they were denied an opportunity to express their views or that the contending positions were not fully debated. The complainants argue that the *ex post facto* revision of the collective agreement was in itself illegal.

24. I do not agree. It is admitted that the collective agreement, as written, does not reflect the consensus reached at the bargaining table, nor is there anything inherently arbitrary or discriminatory in the form of language which would have appeared in the collective agreement, but for the inadvertent error of the union and employer in recording what they had agreed upon. All that the union and employer have done is to rectify that mistake so as to put the complainants in the position that they would have been in had the error not occurred. Moreover, before doing so, the union officials consulted the membership which, the complainants concede, affirmed that course of conduct. Given the complexity of collective bargaining, transcription errors of the kind apparently present here are bound to occur from time to time and I do not think that it can be considered a breach of section 68 of the *Labour Relations Act*, when a trade union, acting in good faith, merely seeks to rectify the situation. On this branch of the complainants' case then, there is no basis for concluding that the union has acted in a manner that is arbitrary, discriminatory, or in bad faith.

III

25. The second branch of the complainants' case poses greater difficulty. But, again, it is necessary to sketch in some of the background.

26. The complainants were originally employed in the manufacturing division which, as I have already noted, shared the same premises with the distribution centre until some time in 1982. In or about March, 1981, the complainants were contemplating a lateral transfer to more attractive positions in the distribution centre. At the time, this was merely a move from one job to another within the same plant.

27. Before making the transfer, the complainants discussed the matter with Linda Coltman, a friend of theirs whom they described as a shop steward. The complainants testified that Ms. Coltman had been a steward for a couple of years and had been elected by a segment of the Local membership. At this point, according to Bill Morton, the Local union had not yet been divided in two.

28. Ms. Coltman is alleged to have said that if the complainants transferred to the distribution centre, they would lose their accumulated seniority for the purposes of any future promotions in the distribution centre, but that in the event of a layoff, their whole company seniority would prevail. The complainants also testified that Ms. Coltman told them that she had received this advice from Archie Nesbitt, the Local union president, and had been assured that company-wide seniority would prevail in the event of a layoff. But when the complainants faced the prospect of layoff in 1983, they were advised that it was their *plant* seniority, not their *company* seniority which would be the governing factor, and, on that basis, they were

displaced from their jobs at the distribution centre. Upon their return to the manufacturing division, they were told by Ivor Quirola, the Local union president, that they had also forfeited any seniority previously accumulated while working in their former position in manufacturing. Thus, upon their return to the manufacturing division they were treated for some purposes just like a new employee – even though they never left the bargaining unit or severed their employment with Xerox.

29. The complainants do not contend that Ms. Coltman intentionally misled them. On the contrary, they attribute her advice to a lack of familiarity with the new collective agreement which had just been negotiated a short time before. The complainants testified that the practice prior to this collective agreement had indeed been based upon company-wide seniority, but that these provisions had been changed shortly before the complainants were considering the transfer. Mr. Morton indicated that, at the time, printed copies of the new collective agreement were not yet available and that Ms. Coltman was not directly involved in the bargaining process. He speculates that she must have been unfamiliar with the extent of the recent changes and that such enquiries as she may have made were either inadequate, or the source of her error. Accordingly, there is no question of improper motive, hostility, dishonesty, discrimination, or bad faith.

30. The complainants' request for a transfer was accepted in the spring of 1981, and when the distribution centre moved to its new location, the complainants moved with it. There they remained until March of 1983, when a reduction in work eventually required a transfer back to the manufacturing division where they had been before. The complainants testified that it was the prospect of a layoff which, for the first time, brought to their attention that their "bumping" rights were contingent upon their *plant* rather than their *company* seniority. Between March, 1981 and March, 1983, they had not had occasion to consider their relative seniority position or the consequences of a layoff. The complainants maintain that if they had known that a transfer would increase their exposure to layoff, they would never have accepted it.

31. The complainants argue that Ms. Coltman made a material misrepresentation which amounts to "arbitrary" action and a breach of the *Labour Relations Act* for which the union is responsible. The complainants assert that they acted upon this misrepresentation to their detriment and seek a remedy before this Board. They seek a direction to revise their seniority date so as to reflect what it *would have been* had they not accepted a transfer to the distribution centre. The complainants are not now out of a job, nor are future layoffs imminent, but they fear that in any future layoff, they may be put in a less advantageous position. Whether these fears will be realized or not, is, at this point, entirely speculative.

32. What the complainants are concerned about is a loss of seniority rights which, they say, flows directly from the bad advice which they were given by a union official. Had they not been told by Ms. Coltman that their full company seniority would prevail in the event of cutbacks, they would never have accepted a transfer and would not now be in a position where (it is said) their plant seniority in the manufacturing division is extremely limited. Nor is there any doubt that seniority is a critical collective bargaining concept. In *Re Tung-Sol of Canada Ltd.*, (1964), 15 L.A.C. 161 (Reville), the board of arbitration had this to say at p. 162:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue

of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

Indeed, the vast majority of arbitration awards hold that where an employee has served in the bargaining unit, is transferred, or promoted out of it, but continues in the employ of the same employer, then seniority dates from the time of original employment unless the wording of the agreement clearly indicates otherwise. This is so even if the person is promoted out of the plant, or transferred to another branch as supervisor, or where the promotion to the supervisory position occurred before the bargaining unit was even organized. Arbitrators have recognized the importance of seniority rights and have been disposed to preserve and protect them unless there is very clear language in the collective agreement which compels some alternative approach. It will be seen, therefore, that on this basis there is little support for Ivor Quirola's assertion that when the complainants transferred to the distribution centre they forfeited their accumulated "plant seniority" in the manufacturing centre. That is not what the collective agreement says, nor is it consistent with the way in which arbitrators would approach the question. Quirola's view, if not clearly wrong, is certainly dubious. It is one thing to say that the complainants cannot splice together seniority acquired at each location, it is quite another to suggest that they have forfeited what they had already accumulated. The union's adherence to that interpretation magnifies the potential consequences to the complainants of their transfer to the distribution centre – a transfer which, on the evidence, would not have occurred but for the bad advice which they received from their shop steward.

33. In interpreting section 68 of the Act, the Board has not applied an unduly onerous or unrealistic standard. It is recognized that union officials will occasionally make mistakes – particularly since lower level union officials are typically elected by their fellow employees to serve on an unpaid part-time basis. They cannot be expected to exhibit the skill and judgment of a trained solicitor, nor should this Board readily engage in second-guessing a process of decision-making that resides at the heart of the administration of the collective agreement. Section 68 was not intended to transform honest errors, carelessness, or even negligence into a public wrong potentially subject to quasi-criminal sanctions. Had the Legislature sought to impose a negligence standard upon trade unions it could easily have done so by appropriate language. But it did not, nor has this or any other labour relations board interpreted the duty of fair representation in this way. On the other hand, the Act does prohibit conduct which is "arbitrary", and in particular cases it may be difficult to draw the line between conduct which is simply wrong or negligent, and conduct which is "reckless", "flagrant", or "consistent with a non-caring attitude", to use some of the phrases mentioned by the Board in *Walter Princesdomu and Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union*, [1975] OLRB Rep. May 444. The focus is not so much on the *correctness* of the union's decision, but on the *process* of decision-making; and as a practical matter where a union's decision appears to be both wrong and affects a critical job interest of the aggrieved employee, the Board will take a hard look at how the union went about its task. In the absence of some explanation as to what it considered, the Board might well conclude that an error

– not in itself offensive – results from a failure to actually turn its mind to the grievor's position, the consideration of wholly extraneous factors, or some other matter which might indicate arbitrariness. To this extent then, section 68 does impinge upon the quality or adequacy of representation, and the merits of a union's decision will be a factor to be weighed in determining whether its actions were "arbitrary".

34. What then of the circumstances in this case? The grievors have suffered a loss of seniority. That loss is tangible even though it may not yet be financial, and it resulted from advice from a union official which the complainants' characterize as "wrong". Moreover, this characterization is supported by the current position of a more senior union official who suggests not only that the earlier advice was erroneous, but also that when the complainants acted upon it they forfeited seniority rights which they had already accumulated. Even that decision seems difficult to sustain on the language of the collective agreement or the established arbitral jurisprudence, but the point is that the Board has no direct evidence at all about the way in which Ms. Coltman conducted herself, whom she consulted, the extent of her enquiries and so on. Accordingly, there is no evidence before the Board to indicate the quality of the union's decision-making or to explain why or how it came to a conclusion or tendered advice upon which the complainants relied to their detriment. Nor is there any way that the complainants could reasonably be expected to know about the internal workings of the union which led to their present dilemma.

35. In the absence of any explanation from the trade union, and in the circumstances of this case, I do not think the Board would be warranted in drawing fine distinctions between mere negligence, serious negligence, and "arbitrary" conduct. There is sufficient evidence before the Board to establish a *prima facie* breach of section 68 of the Act and in the absence of an explanation from the respondent, the Board finds that a breach of section 68 has in fact been established. I turn now to the question of remedy.

36. As I have already noted, both the respondent trade union and Xerox were served with a copy of this complaint – the latter, not because there was any allegation against it, but because it could potentially be affected by any remedy the Board might be asked to fashion. However, although duly served, neither party chose to appear at the hearing.

37. The complainants' loss is tangible but, at this stage, not financial. This is not a case in which the Board should embrace the principles in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, and try to calculate some monetary compensation based upon the work opportunities which the complainants may lose as a result of their loss of seniority. In my view, the most appropriate remedy is simply to direct that the union and Xerox rectify the complainants' position on the seniority list to put them in the position they would have been in had they never transferred to the distribution centre; that is, had they never received the bad advice upon which they acted to their detriment. The Board directs that the complainants be credited at the manufacturing centre with their *full company seniority*, just as if they had never left.

38. The Board will remain seized in the event that there is any difficulty in implementing this remedial direction.

0019-82-R; 0052-82-U International Ladies Garment Workers' Union, Applicant, v. Apple Bee Shirts Limited, Respondent, v. Group of Employees, Objectors

Practice and Procedure – Remedies – New Board practice as to non-compliance set out – Respondent provided copy of letter alleging non-compliance with Board order – Filed in court without hearing where non-compliance admitted or no response received from respondent

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members W. H. Wightman and B. L. Armstrong.

DECISION OF THE BOARD; December 9, 1983

1. The Board by decision dated September 26th, 1983, ordered the respondent to pay certain amounts to certain of its employees as set out in paragraph 2 of that decision.

2. The solicitors for the complainant wrote the following letter to the Board dated October 17th, 1983:

“We are in receipt of the Board’s decision in the within matter dated September 26, 1983, whereby certain amounts were to be paid for wages and vacation pay to certain former employees of Apple Bee Shirts.

By letter dated October 5, 1983, we wrote to the receiver of Apple Bee Shirts demanding payment of the amount. By letter dated October 12, 1983, a copy of which we enclose, the receiver responded, indicating that the company is insolvent and no funds are available to pay the unsecured claim.

Pursuant to the provisions of Section 89(6) of *The Labour Relations Act*, we request, on behalf of our clients, that the Board file in the Office of the Registrar of the Supreme Court, a copy of its decision dated September 26, 1983 in the prescribed form, whereupon the determination can become a Judgment of that court and is enforceable as such.”

3. The Board provided a copy of the letter it had received from the solicitors for the complainant to the respondent and advised the respondent that unless the order had been complied with, the Board would be filing its order with the Supreme Court of Ontario.

4. Section 89(6) of the *Labour Relations Act* provides in part:

“Where a trade union ... employer, ... person or employee has failed to comply with any of terms of the determination, any trade union, person or employee, affected by this determination, may, after the expiration of fourteen days from the date of the release to the determination, or the date provided in the determination for compliance, which ever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefore, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment order of that Court and is enforceable as such.”

5. Although section 89(6) appears to suggest that the Board must file its determination with the Registrar of the Supreme Court upon being notified of a failure to comply with that order, the Board, with the approval of the Court (see *Chairtex Manufacturing* [1971] 3 O.R. 154) has required a party requesting that an order be filed under section 89 prove the fact of non-compliance. While it has been the Board's practice to schedule a hearing to deal with non-compliance, the Board has recently introduced a procedure whereby it advises the respondent of the allegation of the failure to comply, and permits the respondent to take issue with that allegation. However, where a respondent either agrees that there has been a failure to comply with the Board's determination or simply does not respond to the allegation that there has been a failure to comply with the Board order, the Board will file its determination with the Court pursuant to section 89(6) of the Act, because in the absence of any response, it will normally be satisfied that there has been a failure to comply.

6. In this case, subsequent to the Board notifying the respondent of the complaint's allegation that it had failed to comply with the Board's order of September 26th, 1983, no response was received from the respondent to this date. Under these circumstances, the Board is satisfied that the respondent has failed to comply with the determination of September 26th, 1983, and hereby files a copy of its determination with the Registrar of the Supreme Court of Ontario.

0303-83-R; 0304-83-R United Brotherhood of Carpenters and Joiners of America, Local 494, Applicant, v. **Arbis Construction Ltd.**, Tony Azar Construction, Tony Azar Construction Limited, Respondents

Constitutional Law – Related Employer – ss.1(4) and 63 requirements that respondents adduce relevant facts not breach of Charter rights – Employers engaged in different aspects of construction industry – Character of operations and markets served different – Employers not “associated or related”

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and P. J. O’Keeffe.

APPEARANCES: *David McKee and James Caron for the applicant; Sheldon L. Schwartz for Tony Azar Construction and Tony Azar Construction Limited; no one appearing for Arbis Construction Ltd.*

DECISION OF THE BOARD; December 19, 1983

1. The applicant has applied to the Board for a declaration under section 63 of the *Labour Relations Act* that there has been a sale of a business or part of a business from Arbis Construction Ltd. (“Arbis”) to Tony Azar Construction (“Azar”) and as a consequence Azar is bound to the collective agreements between the applicant and Arbis. The applicant has also applied to the Board for an order under section 1(4) of the Act that Arbis and Azar are one employer for the purposes of the Act and for a declaration that Azar is bound to the collective agreements between the applicant and Arbis.

2. Having regard to the agreement of the parties, Tony Azar Construction Limited (“TACL”) is added as a respondent to this proceeding.

3. At the commencement of the argument before the Board, the applicant informed the Board that it was addressing argument on the application for relief under section 1(4) and would not be making submissions with respect to its request for relief under section 63 of the Act. Having regard to the evidence and representations before it, the Board dismisses the application under section 63 of the Act.

4. At the commencement of the hearing, Azar and TACL raised for the first time and argued that the onus requirements in sections 1(5) and 63(13) of the Act were contrary to the provisions of section 11(c) and (d) of the *Canadian Charter of Rights and Freedoms* (being Part I of the *Constitution Act, 1982*). After hearing the argument of the parties, the Board made the following oral decision at the hearing:

The applicant has made application for relief under sections 1(4) and 63 of the *Labour Relations Act*. By virtue of the provisions of sections 1(5) and 63(13) “the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation”. The respondents raised at the hearing for the first time an objection to the provisions of sections 1(5) and 63(13). It was the position of the respondents that sections 1(5) and 63(13) were contrary to the provisions of section 11(c) and (d) of the *Canadian Charter of Rights and Freedoms*

(being Part I of the *Constitution Act, 1982*) in that an onus or duty is imposed on the respondents and also that the respondents were being compelled to be witnesses in proceeding against themselves with respect to an offence.

The provisions of sections 1(4) and 63 do not refer to onus but rather to a requirement to adduce facts within the knowledge of the respondents. In this regard sections 1(5) and 63(13) are unlike section 89(5) of the *Labour Relations Act* which refers to "burden of proof". In our opinion, the respondents have not been charged with an offence within the meaning of section 11 of the *Canadian Charter of Rights and Freedoms* and since the legal onus of establishing entitlement to relief under sections 1(4) and 63 rests with the applicant there is no presumption of guilt, responsibility or liability against the respondents or compulsion to be a witness within the meaning of sections 11(c) and (d). The provisions of sections 1(5) and 63(13) are evidentiary requirements and do not constitute a violation of sections 11(c) and (d) of the *Canadian Charter of Rights and Freedoms*. Therefore, the Board has jurisdiction to hear the application for relief under sections 1(4) and 63 and sections 1(5) and 63(13) are not in violation of sections 11(c) and (d) of the *Canadian Charter of Rights and Freedoms*.

Azar and TACL advised the Board that they would proceed under protest.

5. Tony Azar is a finish carpenter and cabinet-maker of some fifteen years' experience and Harry Bischoff is a carpenter with more than thirty years' experience. Both of them were formerly members of the applicant. They were familiar with each other's ability and experience having previously worked for a common employer and in 1979 decided to carry on business together as equal and the only shareholders in Arbis. Arbis operated for the last nine months of 1979 and had sales of about \$150,000. In 1980 sales were \$400,000 and in 1981 sales were \$570,000. In 1979 and 1980, Arbis enjoyed profits of \$28,000 and \$33,000, respectively. In 1981, Arbis suffered a loss of \$25,000. Messrs. Azar and Bischoff had a meeting with their chartered accountant Terence Loebach in October of 1981, at which time the losses were becoming evident. As a result of the meeting they decided to try and cut costs. However, Arbis' financial situation began to deteriorate even more and in April of 1982 a similar meeting was held and it was obvious that Arbis was in an extremely difficult financial position. Mr. Loebach advised Messrs. Azar and Bischoff that Arbis had gone past any point of return with the extremely poor state of the economy in Windsor, with construction at a standstill and with interest rates in excess of twenty per cent. He advised them to discontinue operations and Arbis, in fact, discontinued operations in 1982. During the period when Arbis made a profit, Messrs. Azar and Bischoff made draws on a roughly equal basis.

6. Arbis during its brief existence performed work in the form of additions to homes, construction of small strip-plazas and land development. In 1979, the biggest job was for the Pompeii Restaurant in Windsor. In 1980 a job for the Becker Milk Company at Thompson and Wyandotte in Windsor provided Arbis with about three quarters of its income. In 1981, a job for the same company on Ottawa Street in Windsor provided Arbis with between two-thirds and three-quarters of its income. Mr. Arbis and Mr. Bischoff managed Arbis and performed basically the same functions such as estimating, obtaining work and quoting contract

prices. Arbis had an office at 1715 Wyandotte Street in Windsor after Arbis had moved its office from Mr. Bischoff's home. Arbis had a shop on Westcott Street in Windsor together with a small warehouse. Azar and TACL have never used either Arbis' office or shop or Mr. Bischoff's home.

7. When Arbis ceased operations, Mr. Bischoff looked for a job and found work and continues to work as an employee of his son who had decided to commence his own business. Mr. Azar also searched for employment and became a salaried supervisory employee of Praxis Builders Inc. ("Praxis") for two and a half months in the Windsor area. Towards the end of his period of employment with Praxis, its principal recommended Mr. Azar for work in the masonry field with a company called Anchor Machine in Windsor. Anchor Machine was aware of Mr. Azar's past and plight in the construction industry. Anchor Machine accepted the recommendation and purchased the material for Mr. Azar to perform the work in the fall of 1982.

8. Arbis employed between three and ten employees (including Messrs. Azar and Bischoff), hired employees through the applicant and owned small hand tools, a construction trailer, a dump truck and a mortar mix machine. The office equipment used by Arbis belonged to Messrs. Azar and Bischoff personally. Arbis purchased its material and supplies from a variety of sources. The construction trailer is now in the possession of a bank and the dump truck is presently in the possession of a garage because Arbis has been unable to pay for necessary diesel repairs. The records of Arbis and the mortar mix machine are in the custody of Mr. Bischoff. Messrs. Azar and Bischoff have considered having Arbis make an assignment in bankruptcy. However, Arbis does not have the money to pay a trustee in bankruptcy. The two of them also were engaged in another unsuccessful business venture when they arranged to lease a store and open a fast food outlet in a plaza which they had developed.

9. Mr. Azar was able to start up in business through the business opportunities presented after doing work for Anchor Machine. TACL was incorporated in May of 1983. Azar has not purchased any equipment from Arbis and has used different bookkeepers, offices and telephone numbers. Azar has never operated out of Arbis' shop and has used neither the logo nor the green and black colour scheme of Arbis. With one minor exception, Azar has not performed work for Arbis' customers. Azar is engaged almost entirely in performing masonry work, unlike Arbis and its source of work is entirely different from the source of work which was tapped by Arbis. Azar and Arbis purchased their materials and supplies from different suppliers. TACL has recently purchased its own office equipment from a supplier of such equipment. Mr. Bischoff has never worked for Azar.

10. In *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406, the Board set forth certain indicia or criteria for making determinations with respect to section 1(4) of the Act. These indicia or criteria for determining whether the activities or businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction or control and therefore may be treated as one employer are: (1) common ownership or financial control, (2) common management, (3) inter-relationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations.

11. With respect to the first criterion, Mr. Azar and Mr. Bischoff were equal owners in Arbis and Mr. Azar is the sole owner of Azar. To this extent, there is a degree of common ownership in Arbis only. This criterion reveals some common ownership and constitutes some

evidence for a finding under section 1(4). The second criterion of common management is similar to the first criterion. Mr. Azar and Mr. Bischoff jointly managed Arbis while Mr. Azar is the sole manager of Azar. This criterion again indicates some evidence for a finding under section 1(4). In considering the third criterion, it is clear that there never has been an interrelationship of operations between Arbis and Azar. While the two companies have operated in the construction industry in general terms, there is no doubt that the two companies worked in different aspects of the construction industry. Arbis was engaged in the development of properties and in the construction and remodelling of commercial and residential properties. On the other hand, Azar is almost entirely engaged in masonry work. Moreover, with the exception of having done a small job for one customer which had previously engaged Arbis, Azar secured work from entirely different sources than Arbis. In considering the fourth criterion, there is no evidence that there was any representation to the public as a single integrated enterprise. On the contrary, Arbis and Azar used different offices, telephone numbers and bookkeepers. Arbis operated conspicuously out of a shop with its own truck, trailer and mortar mixer with its colours of green and black and its own logo. Azar does not operate out of a shop or warehouse, but rather out of Mr. Azar's residence, its corporate colour is green and it does not have a logo. Arbis and Azar used different suppliers of materials and supplies. Finally, there is no centralized control of labour relations by Arbis and Azar. In this respect, there has never been any common control much less centralized labour relations.

12. Arbis remains as an insolvent company which is inactive and seems likely to remain in this condition. In April of 1982, Mr. Bischoff and Mr. Azar were faced with the need to earn a living. Mr. Bischoff was able to secure employment with his son and is still so employed. Mr. Azar initially found employment with Praxis where he worked for two and a half months as a salaried employee. Due to fortuitous circumstances which he did not initiate, he was able to again endeavour to work for himself in the industry he knew best – the construction industry. Azar represents a new business disassociated from Arbis. Azar and Arbis each directed its services towards a different segment of the construction industry.

13. While there is some degree of correspondence of the first two criteria set forth in *Walters Lithographing Company Limited, supra*, on balance, the criteria have not been satisfied. Moreover, section 1(4) requires consideration of more than common control or direction. Section 1(4) states:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individual firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Before the Board may exercise its discretion under section 1(4) there are three conditions which must be found to exist. There is the obvious requirement that there be more than one corporation, individual firm, syndicate or association involved in the application. This requirement, of course, has been satisfied. However, there are the additional requirements that the entities be both “associated or related” and under “common control or direction”. As the

Board has indicated, Arbis and Azar affected by this application are not under common control or direction. There remains "associated or related". As the Board stated in *Diversey (Canada) Limited and Diversey Environmental Products Limited*, [1978] OLRB Rep. Sept. 814 at 817:

The need for these latter two requirements is not difficult to understand. Section 1(4) allows the Board to pierce the corporate veil in order to avoid the types of situations outlined in *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Oct. 1209. It is not designed to bind independent or unrelated enterprises. In deciding whether the statutory prerequisites have been satisfied, the Board has regard to a broad range of industrial relations considerations, some of which may overlap in their relevance to the various issues, and all of which may vary in importance depending upon the particular fact situation at hand.

14. The question of whether Arbis and Azar are "associated or related" requires the Board to consider the nature of their business activities. As the Board pointed out earlier, Arbis and Azar are engaged in different aspects of property development and construction. As the Board stated in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and are carried on for the benefit of related principals. In our view, Arbis and Azar are neither of the same character nor serve the same general market.

15. In conclusion, the Board finds that Arbis Construction Ltd. and Tony Azar Construction and/or Tony Azar Construction Limited is/are neither associated or related in their activities nor are they under common control or direction. The applicant is not entitled to a declaration that Tony Azar Construction and/or Tony Azar Construction Limited is/are bound by the collective agreements to which Arbis Construction Ltd. is bound. The application under section 1(4) of the Act is dismissed.

2339-82-R Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **BioShell Inc.**, Respondent, v. Canadian Paperworkers Union, Intervener, v. Group of Employees, Objectors

Practice and Procedure – Representation Vote – Applicant union claiming new vote on basis of breach of silent period after unfavourable vote results known – Visit by intervener's officials of one employee at home only technical breach – Right to object waived by signing of waiver form with full knowledge of breach

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *P. J. Falzone and Marcel Lacroix for the applicant; W. S. Cook and R. W. Pirrie for the respondent; David Watson, Andre Foucault and Don Beagan for the intervener; no one appearing for the objectors.*

DECISION OF THE BOARD; December 16, 1983

1. A representation vote was conducted in the above matter on September 14, 1983. The report of the Returning Officer records that seven employees voted in favour of the applicant union while eleven employees voted for the intervener. By a letter dated September 19, 1983, counsel for the applicant union, Local 2995, complained that the intervener, the Canadian Paperworkers Union (C.P.U.), breached the silent period imposed by the Board which was to be in effect from midnight, September 10th until the vote was taken on September 14th. Counsel for Local 2995 maintains that the C.P.U.'s violations of the silent period constitute sufficient grounds to cause the Board to set aside the representation vote of September 14, 1983 and order that a new vote be taken.

2. The instant application for certification which was filed on February 10, 1983 has been through various stages. The Board's initial hearing was held on March 4, 1983. By a decision dated March 21, 1983 (now reported at [1983] OLRB Rep. Mar. 318) the Board dismissed Local 2995's objection to the membership evidence filed by the C.P.U. The Board concluded on the basis of the membership evidence before it that both the applicant and intervener were entitled to participate in a representation vote.

3. Following the release of the Board's decision, Local 2995 raised the question of whether the ballot should provide the employees with a choice between the two competing unions only or whether the ballot should include a no union option as well. By a decision dated April 27, 1983 and having regard to the unique circumstances of the matter, the Board directed that the voters be asked only whether they wished to be represented by Local 2995 or the C.P.U.

4. Following the issuance of the Board's decision on April 27, 1983 (now reported at [1983] OLRB Rep. April 483) the respondent employer requested the Board to reconsider its decision to remove the no union option from the ballot. For the reasons set out in the Board's decision dated June 16, 1983 (unreported) the Board denied the respondent's request for reconsideration and confirmed its decision dated April 27, 1983.

5. Subsequent to the Board's June 16th decision an application for judicial review of the Board's decision and an application for a stay of the vote pending the outcome of the judicial review were filed before the Divisional Court of Ontario. On September 6, 1983 the Divisional Court rejected the stay application and the vote was ordered to proceed.

6. By way of further background we note that the Board issued a provisional policy with respect to the elimination of silent periods for all votes directed on and after July 1, 1983. The vote in the instant matter, however, was directed on March 21, 1983. The notices issued by the Board to the parties on July 19, 1983 confirming that the representation vote would be held on September 14, 1983 contained the following direction:

I direct all interested persons to refrain and desist from propaganda and electioneering from midnight of Saturday, September 10, 1983 until the vote is taken.

The Board further included this direction in the Notices of Taking a Vote which were posted for the eligible voters.

7. With this background we turn to consider the evidence brought forward by Local 2995 to substantiate its claim, firstly, that the C.P.U. "conducted an intensive door-to-door campaign from and including Monday, September 12, to the date of the vote" and, secondly, that "this campaigning was designed to have, and in fact had, a significant impact on the results of the vote."

8. Mr. Garfield Bowker is employed at BioShell Inc. and was among the group of employees entitled to participate in the representation vote. He testified that the day prior to the vote he was visited by two representatives of the C.P.U. He testified that they introduced themselves and talked about the union and upcoming vote. Mr. Bowker then questioned the C.P.U. representatives about union dues and the election of officers. He confirmed that they stayed between 15 and 30 minutes; he "guessed" that the purpose of their visit was to ensure that he would vote for the C.P.U. He stated, however, that their visit actually produced within him a negative reaction to the C.P.U. because he felt that they had breached the silent period. While Mr. Bowker stated that they talked about the union and the vote he gave no particulars which would suggest that the C.P.U. representatives made a direct attempt to influence him to vote in their favour.

9. No employee other than Mr. Bowker was called by Local 2995 to testify to a visit from representatives of the C.P.U. during the silent period.

10. Mr. Marcel Lacroix is a representative of Local 2995. He was involved as the organizer from the outset of Local 2995's campaign for certification at the BioShell plant. Moreover, he appointed Local 2995's scrutineers for the two stage representation vote. One portion of the vote was held from 6:30 to 7:30 a.m. on the morning of September 14th and the other from 6:30 to 7:30 p.m. that evening.

11. Mr. Lacroix stated that when he returned to the plant for the evening vote at approximately 6:00 p.m. a few employees asked him why the C.P.U. had campaigned in the final days before the vote. Mr. Lacroix testified that each of the five or seven employees standing there told him that the C.P.U. had visited them at their respective homes on either the

Monday or Tuesday before the Wednesday vote. This evidence, however, is hearsay and cannot be relied upon to establish that representatives of the C.P.U. actually visited any of the employees. If Local 2995 wanted to establish the existence of additional visits to employees it could have brought the individuals before the Board to so testify.

12. In response to the employees' questions Mr. Bowker replied that he understood from the Board's notices that the silent period applied during the days preceding the vote. Mr. Lacroix asked the Board's Officer about the application of the silent period but was not given a definitive answer.

13. Mr. Lacroix then went to the lunchroom to proceed with the evening vote. At approximately 7:15 p.m. the balloting was concluded and the parties went to the company office to count the ballots. Prior to the counting of the ballots, however, Mr. Lacroix signed the following Consent and Waiver form:

WE the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 14th day of September, 1983.

AND WE hereby waive any objection as to the regularity and sufficiency of the balloting.

A representative from both the C.P.U. and the employer also signed the Consent and Waiver form. Mr. Lacroix testified that he did not have any objection to the actual conducting of the vote so he signed the waiver. He stated that as the waiver did not mention the campaign, he thought it simply applied to the vote. On cross-examination Mr. Lacroix acknowledged that he was aware that the ballot box could have been sealed after the taking of the vote if he had had an objection.

14. Counsel for Local 2995 argues that the Board should draw a negative inference concerning the extent and purpose of the campaign conducted by the C.P.U. during the silent period from the fact that the C.P.U. did not call evidence. Counsel maintains that the Board should conclude from the C.P.U.'s failure to call evidence that the C.P.U.'s representatives probably visited each employee in the bargaining unit during the silent period and engaged in an intensive campaign. Counsel further maintains that the actions of the C.P.U. were designed to influence the outcome of the representation vote and that the breaches of the silent period were so serious that they warrant setting aside the September 14th vote.

15. Counsel for the C.P.U. argues that the evidence before the Board establishes no more than that representatives of the C.P.U. visited one employee during the silent period. He maintains that Mr. Bowker's description of the visit hardly suggests an intensive campaign to influence him to vote for the C.P.U. In fact, counsel argues, the evidence does not establish that the C.P.U. even asked Mr. Bowker for his vote. Council asserts that in these circumstances the Board should decline to draw a negative inference from the C.P.U. decision not to call evidence; in his view Local 2995 brought forward nothing for the C.P.U. to refute. Accordingly, counsel for the C.P.U. maintains that even if the silent period was applicable to this vote, the C.P.U. did not engage in conduct which would justify setting aside the vote.

16. Counsel for the C.P.U. takes the further position that Local 2995 lost its opportunity to object to the alleged pre-vote conduct because Mr. Lacroix signed the Consent and Waiver form in order to have the ballots counted immediately after the vote. At the time he signed the waiver he had already been informed that C.P.U. representatives had visited employees during the silent period. He was already possessed, in other words, of the facts which would later form the substance of his objection. Counsel emphasized that it was only after the vote had been counted and Mr. Lacroix learned that Local 2995 lost that he raised the objection based on the C.P.U.'s alleged breach of the silent period.

17. In *Bermay Corporation*, [1980] OLRB Rep. Feb. 166 the employer raised an objection to the regularity of the representation vote after the vote had been counted and therefore, after it had signed the consent and waiver form. The respondent submitted that the vote was prejudiced because of the participation of the union's president as scrutineer at the balloting. Prior to the vote the employer had objected to the participation of the union's president as scrutineer. The Board, however, ordered the employer to allow any scrutineer chosen by the union to enter the premises for the purposes of the vote indicating that it would be open to the employer to object to the union's choice of scrutineer after the balloting in the appropriate form. The employer, though, did not raise its objection immediately after the balloting; instead it signed a Consent and Waiver form which allowed the ballots to be counted. When the employer sought at the Board's hearing to raise its objection to the vote on the basis of the participation of the union's president as scrutineer, the Board held that it was not open to the employer to object to the regularity of the vote after having signed a waiver and after having learned of its defeat in the vote. At paragraph 11 and 12 of its decision the Board made the following statement:

Normally when all of the ballots are in the box following a representation vote the parties are given the opportunity of having the ballots counted immediately by the Board's Returning Officer. That way parties can learn right away what their collective bargaining situation will be as a result of the vote. A further advantage to an immediate count is that the result may render academic outstanding issues attaching to the application and eliminate the need for further litigation. The Board will not, however, count the ballots immediately after the vote unless it is clear that both parties are prepared to be bound by the result of the count. The Board therefore requires the parties to sign a "Consent and Waiver" form prior to counting the ballots. In this case the Consent and Waiver form presented to the parties states:

'We the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 17th day of September, 1979.

And we hereby waive any objections as to the regularity and sufficiency of the balloting.'

Prior to the counting of the ballots the above form was signed by Mr. Dorfman for the union and by Mr. Brisbin, the employer's counsel, for the company.

The employer, by objecting now to the union's scrutineer, is attempting to go back on that understanding. Having first waived any objection to the conduct of the vote it is not open to the employer to complain about the regularity of the balloting now having learned that the result of the vote was favourable to the union. That is precisely what the Consent and Waiver form is designed to prevent. If the Company had wished to pursue its objection it should have requested that the ballot box be sealed and the ballots not be counted pending a ruling on the merits of its complaint. Having failed to do so it may not now deny its counsel's undertaking.

18. In the instant matter the union's representative Mr. Lacroix, signed the Consent and Waiver form and learned the outcome of the vote. Although Mr. Lacroix was aware of the alleged misconduct prior to signing the Consent and Waiver form, he did not raise his objection to the validity of the vote until after he learned that Local 2995 had lost the vote. Mr. Lacroix acknowledged that he was aware that he could have asked that the ballot box be sealed and the vote not counted in order to raise an objection to the vote. The Board cannot accept the suggestion that he did not understand that waiving "any objections as to the regularity and sufficiency of the balloting" would include an objection arising out of an alleged breach of the silent period.

19. Consistent with its decision in *Berlmay Corporation*, the Board is of the view that Mr. Lacroix waived any objection he might otherwise have had to the regularity of the balloting when he signed the Consent and Waiver form to clear the way for the immediate counting of the ballots. No new facts came to his attention following the counting of the ballots which would have caused him to complain after rather than before signing the waiver. Moreover, the Board does not accept that Mr. Lacroix was so confused about the application of the silent period to the vote in question so as to nullify the effect of his failure to object in a timely manner.

20. Quite apart from the effect of Local 2995's signing of the Consent and Waiver form the Board is of the further view that the alleged misconduct is not of such a nature as to cause the Board to set aside the representation vote. The Board summarized the purpose of the silent period in *Anderson Metal Industries Inc.*, [1981] OLRB Rep. Apr. 415 at para. 9:

Its primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressures and influences as the voting day approaches. The Board's view has always been that at that point the individual employee should be left free to make a purely personal decision as to how he should vote.

In *Treco Machine & Tool Ltd.*, [1981] OLRB Rep. Oct. 1503 the Board dismissed the employer's application to set aside the results of a vote on the basis of violations of the Board's silent period because the Board did not consider that the statements had unfairly influenced the outcome of the vote. At page 1507 of its decision the Board said,

Having regard to the nature of the impugned statements, the source of the speculation in which employees were engaging, and the person by

whom the statements were made, the Board is not satisfied that the statements were such as can be said, on the balance of probabilities, to have unfairly influenced the outcome of this vote.

21. In *Tops Food Market*, [1982] OLRB Rep. Dec. 1951, the concurring opinion of Board Members W. H. Wightman and S. Cooke paved the way for the Board's provisional policy lifting the silent period rule. At paragraph 4 of its decision the Board Members made the following comments:

From this brief review of the Board's jurisprudence on the silent period it can be seen that the Board has gradually narrowed the silent period rule in order to avoid the delay and other costs associated with repeat representation votes and the litigation that accompanies such votes. Indeed, the primary thrust of these cases is a mounting concern that the silent period is being used as a pretext by parties who merely wish to delay and obstruct proceedings before the Board. In the *Treco* case, *supra*, the Board Members Wightman and Hodges questioned the continued utility of the silent period rules and suggested that the Board dispense with this practice altogether. We would like to emphatically reiterate this suggestion. The utility of the silent period is clearly outweighed by its inconveniences. (Indeed it is questionable whether the silent period serves any useful purpose. It would seem that the silent period is merely an anachronistic hangover from the infancy of labour relations law in Ontario when the government adopted a basically paternalistic attitude towards employees.) Furthermore, there are alternative methods of attaining the objective of the silent period, namely to ensure that employees are able to express their true wishes in a representation vote. The Board clearly has ample powers under the *Labour Relations Act* to remedy any conduct preceding a vote which potentially distorts the outcome of the vote. Nothing is gained by imposing a blanket prohibition on campaigning for three days before the vote and much is lost in terms of increased potential for costly and time-consuming litigation. Therefore we urge the Board to cease its practice of ordering the imposition of a silent period under section 68(j) of its Rules of Procedure.

22. The Board cannot conclude on the balance of probabilities that the C.P.U.'s representatives' visit to Mr. Bowker during the silent period would have unfairly influenced the outcome of the vote notwithstanding that it constitutes a technical breach of the silent period. There's no evidence to suggest that the C.P.U. representatives exerted direct pressure on Mr. Bowker. The only details of the conversation brought to the Board's attention were questions asked by Mr. Bowker on the union's dues and the election of officers. We can scarcely conclude from this that the C.P.U. unfairly influenced the outcome of the vote.

23. In the result, having regard to both the nature of the C.P.U.'s breach of the silent period and the untimely manner in which the Local 2995's objection was taken, the Board dismisses the application of Local 2995 to set aside the representation vote taken on September 14, 1983.

24. Accordingly, the Board affirms the results of the September 14th representation vote.

25. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the intervener.

26. A certificate will issue to the intervener.

27. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

DECISION OF BOARD MEMBER, W. H. WIGHTMAN;

1. As indicated at paragraph 20 of the majority decision, the Board would have dismissed the application even if Mr. Lacroix had registered his complaint by refusing to sign the waiver. It would have done so on the basis that the allegations even if accepted as proven were not of such a nature as to warrant upsetting the vote.

2. In this connection the evidence of the complaint's witness, Mr. Bowker, is telling. With respect to the visit to his home by two C.P.U. representatives Mr. Bowker "'guessed' that the purpose of their visit was to ensure that he would vote for the C.P.U.'" (quoted words are from paragraph 8 of the Board decision). In the absence of their having said so, it seems to me reasonable for Mr. Bowker to have concluded they were not calling on behalf of the United Way. Whatever the C.P.U. representatives may have said the significant point is that *the effect* on Mr. Bowker was *negative* and that he so testified in an uninhibited fashion when called as a witness by the union opposing the C.P.U.

3. There is a long line of cases in which the Board has refused to order representation votes on the basis of the Board having been persuaded that employees have been intimidated to the extent that a government conducted secret ballot vote would not reveal their true wishes.

4. Mr. Bowker's testimony stands for this proposition that it is more in keeping with human nature to expect that, if anything, intimidation before a vote is likely to result in the employee using the privacy of the voting booth as an opportunity to get back at the tormentor.

1335-83-OH Robert Gill & David Hussey, Complainant, v. **Black & McDonald Ltd.**, Respondent.

Health and Safety – Remedies – Grievance abandoned at first stage – Complaint under OHSA not barred – Supervisor not communicating complainants’ safety reasons for refusal to higher management – Discharges unlawful – Board finding one week suspension of complainant warranted because of post-discharge misconduct

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members Robert J. Swenor and C. A. Ballentine.

APPEARANCES: *David Starkman and Jens Drees for the complainant; W. G. Dingwall, Q.C., for the respondent.*

DECISION OF THE BOARD; December 14, 1983

1. Bob Gill and Dave Hussey contend they were discharged in contravention of section 24 of the *Occupational Health and Safety Act* for refusing to perform unsafe work.

2. The complainants had been employed by Black & McDonald Ltd. as electricians at the Atikokan power project before they were dismissed on August 11, 1983. Dave Hussey has been an electrician for twelve years, and is one of seventy members of the International Brotherhood of Electrical Workers who has completed a health and safety course offered by the union. Bob Gill, who has been an electrical worker for fourteen years, has previously served as a safety representative on another project.

3. On August 11th, the complainants were engaged in pulling electrical cable along cable trays, as they had been for some weeks previously. A cable tray resembles a ladder resting in a horizontal position with rungs running parallel to the ground. The tray upon which they refused to work is two feet wide, with cross pieces every twelve inches, and is made of aluminium. The section of tray in question is a total of twenty-three feet in length and is attached by hangers to structural steel supports overhead. For a distance of four or five feet at one end, the tray is approximately five feet above a wooden work platform. Beyond the platform, the tray is between twenty and twenty-five feet above the concrete floor. At the other end, this section of tray passes four feet below a permanent steel walkway. The distance from the edge of the platform to the edge of the walkway is approximately thirteen feet. Three I beams, 10 inches in size, cross the tray approximately three feet above it – one at the edge of the platform and the other two at intervals of about five feet.

4. We heard several different accounts of how the refusal to work occurred at about six o'clock on August 11th. Robert Fleming was the lead hand on the afternoon shift that night. He testified that both complainants refused to obey his instruction to climb from the platform onto the tray, each saying "I don't climb tray", and making no mention of safety. According to Fleming, he then called the foreman on a walkie-talkie to ask for ladders, and told the complainants they could use ladders. But they responded with laughter, so he and another employee pulled the cable across this section of tray. Robert Fleming did not wear a safety belt while walking along the tray. He testified that walking along a suspended tray was standard practice.

5. According to Dave Hussey, Fleming asked him to climb out on the tray, after first asking Bob Gill to do the same, and each refused, citing safety as the reason. Hussey then said he would do the job if given a ladder, but Fleming just walked away. Another employee went out on the tray to pull the cable and Hussey assisted from the ground.

6. Bob Gill testified that both he and Hussey told Fleming they would not walk out on the tray for safety reasons, and that Hussey said they would do the job from ladders. At this point, Fleming disappeared for a minute. Hussey and Gill remained on the platform and completed the work, with the assistance of Frank Samardzija who crossed the tray and took up a position near the walkway. Hussey fed the cable to Gill who in turn fed it to Samardzija. Once the cable reached Samardzija, Hussey moved to the ground to assist from that location.

7. Frank Samardzija testified he heard both the complainants refuse to climb out on the tray on the grounds of safety. They asked for ladders, and were then told by Fleming to obtain ladders. Samardzija completed the job with the assistance of Gill and Hussey, who remained on the platform, and Fleming.

8. Bob Topley was also a member of the complainants' crew on August 11th. He was stationed near the top of the plant, playing out the cable from a large reel, and could not hear what the others said. He testified that there was no interruption in unwinding the cable.

9. The complainants were equipped with safety belts and lanyards. As there was not a life line along the section of tray in question, the only way to secure the lanyard was to an I beam. An employee who "tied off" to each of the beams in succession while crossing the tray would be unsecured while transferring the lanyard from one beam to the next. Several witnesses commented on the availability of ladders on the night shift. Frank Samardzija testified that the crew experienced difficulty obtaining ladders because they were locked up and the foremen did not have a key. Greg Luczyk, the electrical superintendent, conceded that the day crew sometimes chained the ladders so that those on nights had to cut the locks. In mid-July, he asked the day shift supervisor to leave the ladders unlocked, and thereafter they were available, although sometimes only after a search. There was conflicting evidence as to whether or not the tray in question was broken in one place.

10. On the evidence before us, we find that Fleming directed the complainants to move along the span of tray that is twenty to twenty-five above a concrete floor, and that they both refused to do so. On this point, all of those who were present are in agreement. We also find that the complainants expressly mentioned safety as the ground for their refusal. In this regard, we accept their evidence supported by Frank Samardzija's testimony. We cannot conclude that the complainants refused to work on ladders. They testified that Hussey requested a ladder, and Samardzija once again substantiated their evidence. Moreover, Fleming did not testify that they disobeyed an order relating to the use of ladders, but rather that they laughed when he called the foreman to obtain ladders and told them ladders could be used. He did not say that he directed them to obtain ladders and they disobeyed, or that ladders were supplied by the foreman and they refused to use them. The only incriminating evidence, even on Fleming's account of the incident, is their laughter; it could be interpreted as either a signal they they would not use ladders or as an indication that they thought ladders would not be readily available. Finally, we conclude that the complainants assisted in the performance of the task in question by feeding the cable from the platform until it reached the other members

of the crew and then by helping from the ground. Although Fleming testified that he and another employee pulled the cable, he did not say that it was not fed to them by Dave Hussey and Bob Gill.

11. Shortly after the refusal to work, Fleming told his foreman, Gord Ray, that the complainants had refused to climb on a tray, and Ray in turn informed Greg Luczyk. According to Luczyk, he was told the complainants refused to climb on a tray and to use ladders, and that they jeered at those who did the work. Luczyk relayed this information to the site manager, John King, and together they decided to discharge the complainants. Towards the end of the shift, Gill and Hussey were summoned to the Black & MacDonald's trailer where they found Luczyk, King and Nick Young, the night steward. As soon as the complainants entered, Greg Luczyk asked them if they preferred to quit or to be fired; they chose dismissal. Dave Hussey then tried to offer an explanation of their safety concerns, but Luczyk said the time for explanations was past. There was a heated discharge of harsh words. Gill and Hussey were told to pick up their pay the next day.

12. The following day they visited the project to collect their pay and to speak with the chief steward. They also returned to the site of their refusal with a camera and accompanied by Mr. G. Grimoldi, an assistant safety officer for Ontario Hydro. According to Hussey, Grimoldi said he didn't blame them for not walking on the tray because one section was broken and the customary practice was to use a platform or life line. Also on that day, one of the complainants was observed removing a safety sign. Denis Semeniuk, a carpentry foreman for Black & McDonald Ltd., testified that they were wearing dark glasses and one of them took down a sign posted on the platform on which they had stood the previous night. The sign warned employees of a danger caused by the location of the platform and cautioned them to wear safety belts. According to Semeniuk, the sign was removed and placed on the ground. Dave Hussey denied that he or Gill had worn dark glasses. He testified that he removed the sign from the back of the platform with the intention of moving it to the front where it would be seen by an employee about to climb the platform. We are unable to accept this testimony as the truth. There would be no reason to drop the sign on the ground if Hussey's intention had been as he claimed. Moreover, if he intended to move the sign, this could have been accomplished the day before when he worked on the platform.

13. Evidence was also led concerning the complainants' work performance prior to August 11, 1983. In early July, both Bob Gill and Dave Hussey worked on a crew under the direction of another foreman, Joe Gil. Bob Gill served as a lead hand for a couple of weeks during this month, and, according to Joe Gil who is not a relative, was conscientious and showed initiative. On July 15th, Luczyk asked Joe Gil to speak to this crew about their low productivity. Joe Gil testified that the crew in question was accomplishing less than the other crew he supervised. When Joe Gil raised the issue of productivity with the employees, Hussey said that the real problem was the employer's poor organization and, in particular, the difficulty employees experienced obtaining ladders. On Joe Gil's invitation, Hussey repeated his comment to Greg Luczyk. Part of the job of pulling cables is tying them down when they are in place. Nick Young testified that this is tedious work, and that he overheard Gill and Hussey say to other employees that they don't tie cables. According to Luczyk, Young reported Gill's comment to him between July 15th and 21st, and around the same time Joe Gil reported a problem concerning the tying of cable by Dave Hussey and other crew members, Luczyk then transferred Hussey to Gord Ray's crew. According to Hussey, he was transferred the day after he complained to Luczyk about the employer's organization and about ladders.

Hussey also testified that Gord Ray asked him to be lead hand while he was away, but in the end some one else played this role. On August 4th, Joe Gil told Bob Gill and all of the other employees on his crew that they were fired for low productivity, but Luczyk and King decided to switch these employees to Ray's crew. Luczyk testified that on August 9th Gord Ray said he didn't want either Gill or Hussey on his crew, because they were too outspoken and Ray didn't think Fleming could handle them. August 11th was the first day since early July that Bob Gill and Dave Hussey worked together.

14. John King and Greg Luczyk both testified that the complainants were discharged for refusing to work on August 11th and for their general poor work performance. The bargaining agent for Black & McDonald Ltd. employees at the Atikokan project is Local 402 of the IBEW; Dave Hussey and Bob Gill are members of Local 353. A grievance concerning their discharge was filed by the business manager of Local 402. A first step grievance meeting, held on September 14th, was attended by the union's business manager, a representative of Electrical Power Systems Contractors Association (EPSCA) and three Ontario Hydro officials, including Mr. G. Grimoldi. Minutes of that meeting and an earlier management caucus, were introduced into evidence. According to this record, Mr. King told those assembled for the labour-management meeting that the complainants were terminated for poor work performance and attitude problems and that safety was not an issue until after the termination. The grievance was not settled at this stage, but the union did not proceed to step two. At the management caucus, Mr. Grimoldi stated he told Dave Hussey and Bob Gill that "the scaffolding was safe and they must wear safety belts".

15. Counsel for the complainants called as witnesses two experts. Mr. Robert Stewart is vice-president and plant manager of Electrovert Limited, a manufacturer of cable trays. A catalogue published by Electrovert states that a notice should be posted on a job site saying that "The cabletrough shall not be used as a walkway". Electrovert is a member of the Electrical and Electronic Manufacturers Association of Canada (EEMAC), and EEMAC's standards address the use of cable trays as walkways:

It is important that paragraphs prohibiting the use of cabletrough as a walkway at anytime, shall be inserted in all job specifications. Permanent notices to this effect shall be prominently displayed after job completion.

According to Mr. Stewart, the tray in question is designed to carry a load of one thousand pounds evenly distributed over a ten foot span; the tray could bear the weight of a man, so long as the total load did not exceed this limit. A rung would curve downwards if stepped on by a man with a bounce.

16. Peter Stopford is employed by Ontario Hydro as an assistant safety supervisor at the Bruce project, and he has been a Hydro safety officer since 1977. He is responsible to the construction manager for the safety of the work force at that site where one hundred and thirty electricians are currently employed to pull cable. Mr. Stopford described walking on a cable tray as a "totally unacceptable" procedure. He recounted an incident at the Bruce site in 1978 when Mr. Andre de Patie slipped off a ten inch pipe while pulling cable along a tray and fell sixteen feet onto a concrete floor. As a result of this accident, and a subsequent investigation by an Occupational Health and Safety officer from the Ministry of Labour, Mr. Stopford issued a directive:

1. Cable pans shall not be used as a scaffold or working platform.
2. Personnel involved in cable pulling, shall not use the cable pan to "walk, crawl or otherwise route in a cable".
3. When the area where cable is being pulled is of such a nature that scaffolds, up-pups, ladders or toppers cannot be used, the workman pulling in cable may use a plywood seat fitted with cleats mounted across the cable pan at a hanger location only.

The workman shall remain stationary and be tied off in accordance with regulation 35 of O.H.S.A.

4. This procedure is only to be used in the cable pulling and cable dressing operation, and only in inaccessible areas.

Up-pups and toppers are two types of hydraulic ladders. In the normal course of events, Hydro disseminates directives such as this to all of its safety offices. Mr. Stopford testified that these procedures are followed at the Bruce, Darlington and Pickering projects, but he has not visited Atkiokan, and has no knowledge of the practices followed there. Mr. Stopford also testified that a telescopic rod could be used by a man standing on a platform to carry a cable across a span of twenty feet. He conceded that working on a ladder while tied off to a structural support was safe.

17. Black & McDonald Ltd. has received two safety awards at the Atikokan project for having the lowest lost time injury frequency of contractors employing more than fifty workers. Upon being hired, employees are given a Black & McDonald Ltd. handbook entitled "Accident Prevention Policy".

18. The relevant sections of the *Occupational Health and Safety Act* are set out below:

23(3) A worker may refuse to work or do particular work where he has reason to believe that,

(a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;

(b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or

(c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker;
- (d) intimidate or coerce a worker because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection(1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

19. Relying upon section 24(2) of the Act, counsel for the employer contended that the complainants were precluded from seeking relief from this Board, because their bargaining agent initiated a grievance, and then abandoned it, after the first step in the grievance process. This argument was rejected under the predecessor legislation, the *Employees Health and Safety Act, 1976*, in *Reed Limited*, [1978] OLRB Rep. Jan. 1, and in a later case, *Inco Metals Company*, [1982] OLRB Rep. May 681, arising under the statute now in force. These two decisions establish that a complaint cannot be brought before this Board after it has been adjudicated by an arbitrator; but that a person whose complaint is not settled to his or her satisfaction in the grievance process, and whose union elects to pursue it no further under a collective agreement, is not barred from coming before this Board. Counsel for the employer also referred us to *Re Hotel, Restaurant & Cafeteria Employees Union and Royal York Hotel* (1983), 42 O.R. (3d) 507 (Div. Ct.): there the court ruled that a grievance could not be submitted to an arbitrator appointed by the Minister of Labour, because it had previously been referred to arbitration, pursuant to a collective agreement. The obvious difference between that case

and the one at hand is that the present complaint did not proceed past the first step of the grievance procedure and has not been referred to arbitration.

20. Section 24(1) prohibits an employer from taking retaliatory action against an employee because he or she has acted in compliance with the Act. In our view, the complainants' conduct complied with the requirements of section 23. Given the expert evidence before us, especially the testimony of Mr. Stopford, we conclude that Bob Gill and Dave Hussey had reason to believe that by walking across the cable tray, using only safety belts and lanyards, they would endanger themselves, within the meaning of section 23(3). The danger would arise when a lanyard was being transferred from one support to another and the employee was unsecured. In other words, they were entitled under section 23(3) to refuse to obey Fleming's directive to walk out on the tray. This was the only task that they refused to perform.

21. Section 23(4) requires an employee who refuses to work to promptly report the circumstances of his refusal to his employer or supervisor. A supervisor is defined by section 1(26) to be "a person who has charge of a work place or authority over a worker". We have already concluded that the complainants told Robert Fleming, the lead hand on their crew, that a concern for safety was the reason they refused to obey his directive to walk across the cable tray. This was the only order that they did not obey, and they completed the work in question by other means, without any noticeable delay. In these circumstances, the requirements of section 23(4) were satisfied by notifying Fleming of the reason for the refusal. As he was the person who gave the order that was disobeyed, he was acting as a supervisor within the meaning of the Act. There was no need to tell Fleming of the circumstances, because he was present when the refusal occurred and was fully aware of the setting.

22. Turning to the reason for the complainants' dismissal, we find that they were discharged because they acted in compliance with the Act. We arrived at the conclusion despite the testimony of John King and Greg Luczyk that they were not told that a question of safety had been raised until after they terminated the complainants for their action on August 11th as well as their earlier performance.

23. For present purposes, we will assume that neither Luczyk nor King deduced that the refusal to work was motivated by safety concerns. To determine whether or not section 24(1) has been violated, we must consider not only the actions of King and Luczyk, by whom the final decision to discharge was made, but also the conduct of Fleming and Ray who were the complainants' immediate supervisors. The order to walk out on the tray was given by Robert Fleming, and the complainants told him they were refusing for reasons of safety. This is all that they are required to do by section 23(4). Fleming then told Ray that they had refused to work, and senior management was informed in turn. The grounds for the refusal were not communicated up the hierarchy because Fleming did not offer this information and those above him did not enquire. In this setting, we conclude that the employer, acting through the four individuals who made up the chain of command, was aware that the complainants had acted in compliance with the Act and discharged them for doing so. The employer, not the complainants, must bear the burden of any failure of communication among those who represent management.

24. According to the employer, the refusal to work on August 11th was only part of the reason for the dismissal of the complainants. In our view, section 24 is violated whenever

any part of the reason for taking action against an employee is that he or she acted in compliance with the Act. This approach accords with that taken by this Board, under the *Labour Relations Act*, in the context of employer discrimination against union activists: see *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745; and *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577.

25. Counsel for the employer contended that, even if his client contravened section 24 on August 11th by discharging Gill and Hussey, they ought not to be reinstated because their conduct the following day was proper grounds for discharge. What is the bearing of this post-discharge misconduct on the complainants' claim for relief?

26. Our remedial mandate is found as section 23(3) of the *Occupational Health and Safety Act* which incorporates the powers set out in section 89 of the *Labour Relations Act*. That section authorizes the Board to "determine what, if anything" an employer who has committed a statutory violation "shall do or refrain from doing". In other words, we have a broad discretion to tailor a remedy to fit the circumstances of each case. This Board has twice previously granted partial or no back pay to employees who had been illegally discharged for union activity but had also engaged in misconduct that warranted discipline. In *FAG Bearings Limited* [1978] OLRB Rep. Jan. 76, an employee was fired after he swore at a foreman and then refused to go to the manager's office. This conduct led the Board to reduce his monetary recovery.

26. He should not, however, be reinstated with full compensation. The remedial authority of the Board in section 79 [now section 89] of the Act is designed to place the employee, in so far as possible, in the position that he would have been in absent any breach of the Act by his employer. (cf. *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 299). The evidence indicates that the employer has a practice of imposing disciplinary suspensions on its employees. We are satisfied that Mr. Kreider would have been subject to suspension.

27. The matter of compensation is therefore remitted to the parties for the purpose of reaching an agreement taking these and any other relevant factors such as lay-offs, into account. The Board shall remain seized of this matter in the event that the parties are unable to reach an agreement with respect to compensation.

In *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316, the employer discharged several strikers for their involvement in an incident at a restaurant which was a gathering place for people engaged to replace them. Some, but not all, of the strikers had physically assaulted the strike replacements. Although the strikers who were at the restaurant, but did not take part in the fight, were illegally discharged, they were denied back pay when reinstated, because the Board was not satisfied that their motive in attending at the restaurant was not to commit an assault.

27. The case at hand presents a new twist, as the misconduct in question occurred after the complainants were disciplined. One is tempted to say that discipline cannot be sustained by subsequent infractions, but labour arbitrators have consistently come to the opposite conclusion in two lines of cases. In the first, the grievors' initial infraction, although deserving

of discipline, did not warrant the penalty imposed, and the arbitrator took post-discharge misdemeanors into account in deciding what penalty was appropriate. See *Re Berlet Electronics Ltd.*, (1968) 19 L.A.C. 125, and *Re Grand Lake Timbers Limited* (1981), 3 L.A.C. (3d) 264. There was no cause for discipline at the time it was meted out in the other line of cases, but the discipline was sustained because of subsequent events. See *Re Douglas Aircraft Co.* (1966), 16 L.A.C. 374, and *Re Uncle Ben's Tartan Breweries* (1975), 8 L.A.C. (2d) 109. The rationale for not overlooking post discharge misconduct was stated most clearly in *Outboard Marine Corporation* (1970), 22 L.A.C. 108, at 117:

Some arbitrators have taken into account any incidents the grievor may have been involved in following his dismissal to assist them in arriving at their decision, of whether or not the dismissal was to be upheld. See *U.A.W. and Douglas Aircraft Co. of Canada Ltd.* (Arthurs, unreported). However, such dismissals were the result of disciplinary action being taken by the employer for some wrong allegedly performed by the employee and if an arbitrator in such circumstances was to ignore the later incidents the employer could conceivably dismiss the employee for any one of the later incidents as soon as he had been reinstated, if such was the case. In other words, at the actual time of the dismissal the arbitrator may have found no justification for such action being taken on the part of the employer but later incidents did give the employer such justification. If the arbitrator refused to look at the later incidents and reinstated the grievor the employer could immediately discharge the employee for such later incidents and another grievance or grievances would be processed.

28. By taking post-discharge misconduct into account, the Board, like labour arbitrators, would further the objective of a final resolution of all differences arising out of a matter submitted for adjudication. But there is another reason for not restricting our focus to the events that produced the dismissal. When a person who comes before this Board seeking a remedy for a statutory violation has already responded to the infraction by retaliating against the party against whom the complaint is directed, this Board ought not to ignore this misconduct on the part of the complainant. Our remedial authority under section 89 of the *Labour Relations Act* gives us ample power to rectify any harm to someone who launches a complaint with clean hands. A complainant who engages in retaliatory self-help, despite our remedial mandate, is thereby no longer deserving of full relief. Moreover, by adopting this approach, we will discourage such misconduct by those who are aware of this policy.

29. Having rejected Dave Hussey's explanation as to why he removed the safety sign, we can only speculate about his true motive. He may have moved the sign so that the pictures he took would bear no evidence of safety consciousness on the part of the employer, intending to replace the sign after the pictures were taken; or he may not have intended to replace it. Given his lack of candour, we are not inclined to adopt the view most favourable to him. In our view, a suspension of one week in duration would be an appropriate penalty for his misconduct. The penalty has been fixed with reference to the incident concerned, the evidence before us relating to the employee's prior record, and the employer's conduct which, in part, precipitated the misconduct. Our remedial order will be tailored accordingly. As the evidence does not suggest that Bob Gill played any part in the removal of the sign, he is entitled to full relief.

30. The Board typically safeguards successful complaints against any loss of income, both past and future, by directing that they be reinstated, and by awarding them back pay for losses already incurred that could not reasonably have been avoided through other employment. In the case at hand, we know neither whether there are now jobs to which the complainants could be returned – in the sense that they would have been laid off at some point in any event – nor the magnitude of the unavoidable losses arising out of the discharge. The parties should attempt to agree upon the appropriate remedy, bearing in mind the Board's general practice and the one week suspension to which Dave Hussey is subject. We remain seized to determine the appropriate form of relief in the event they cannot agree.

31. Counsel for the complainants urged us to bring both this violation and the provisions of the *Occupational Health and Safety Act* to the notice of employees by means of a notice posted in the work place and mailed to their residences. To remedy the results of the contravention of section 24 of the Act, we make the following directions.

- (i) The respondent shall post copies of the attached notice, signed by an authorized representative, in conspicuous places, at the Atikokan project, where the notices will come to the attention of the respondent's employees, for a period of sixty working days. Reasonable steps shall be taken by the respondent to insure that the notices are not altered, defaced or covered by any other material.
- (ii) Any person having notice or knowledge of the order set out in paragraph (i) above shall permit the respondent to comply with that order.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I am satisfied that the decision of this Board is correct in all regards and that the two complainants refused to work, under conditions that they believed, to be unsafe, and accordingly acted within their rights under the "*Occupational Health and Safety Act* of Ontario".

2. A point that disturbed me in this case was that the assistant shop steward, Mr. Nick Young, the only trade union representative on this construction site, representing electricians gave evidence that safety was not one of his functions. Mr. Young's evidence was that he was called to the company office by Mr. Luczyk the night electrical superintendent on the night the complainants were discharged. He said "Mr. Luczyk gave the complainants the option of either to quit or be fired". He said the two complainants had a conversation with him and wanted to clarify their position in regard to refusing to work on the cable tray. He also gave evidence that he had worked on cable trays and felt it was not unsafe to do so but he did not check that particular cable tray in question at the time of the complainants' discharge.

3. Mr. Young in answering a question that I personally directed to him stated "that safety was not one of his *functions*, and he had not attended safety meetings but he believed that the chief shop steward on the day shift attended safety meetings and was involved in safety functions".

4. I find this situation shocking that a shop steward, the agent of the trade union on

a construction project would not consider safety to be one of his responsibilities in representing his fellow workers, especially in this type of situation where a crew of tradesmen were working a night shift and a safety representative of Hydro and/or a designated safety committee person was not on duty at the project.

5. Section 23(4) of the *Occupational Health and Safety Act* reads as follows:

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

(a) a committee member who represents workers, if any;

(b) a health and safety representative, if any; or

(c) a worker who because of his knowledge, experience and *training is selected by a trade union that represents the worker*, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(emphasis added)

It is clear that the Legislature envisaged that when a designated "safety committee member" and/or a "health and safety representative" is not present then a person selected by the trade union to represent the workers would perform the functions in accordance with the Act. I believe that the trade union has a duty to select union representatives (Shop Stewards) that are competent to fulfill and carry out their responsibilities under the *Occupational Health and Safety Act*.

Appendix

OCCUPATIONAL HEALTH AND SAFETY ACT

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE, BLACK & McDONALD LTD., HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED SECTION 24(1) OF THE OCCUPATIONAL HEALTH AND SAFETY ACT BY DISCHARGING BOB GILL AND DAVID HUSSEY, ON AUGUST 11, 1983, BECAUSE THEY EXERCISED THEIR RIGHT UNDER SECTION 23(3) OF THE OCCUPATIONAL HEALTH AND SAFETY ACT.

SECTION 23(3) PROVIDES:

- (3) A WORKER MAY REFUSE TO WORK OR DO PARTICULAR WORK WHERE HE HAS REASON TO BELIEVE THAT,
 - (A) ANY EQUIPMENT, MACHINE, DEVICE OR THING HE IS TO USE OR OPERATE IS LIKELY TO ENDANGER HIMSELF OR ANOTHER WORKER;
 - (B) THE PHYSICAL CONDITION OF THE WORK PLACE OR THE PART THEREOF IN WHICH HE WORKS OR IS TO WORK IS LIKELY TO ENDANGER HIMSELF; OR
 - (C) ANY EQUIPMENT, MACHINE, DEVICE OR THING HE IS TO USE OR OPERATE OR THE PHYSICAL CONDITION OF THE WORK PLACE OR THE PART THEREOF IN WHICH HE WORKS OR IS TO WORK IS IN CONTRAVENTION OF THIS ACT OR THE REGULATIONS AND SUCH CONTRAVENTION IS LIKELY TO ENDANGER HIMSELF OR ANOTHER WORKER.

WE WILL NOT DO ANYTHING THAT INTERFERES WITH YOUR RIGHT UNDER THIS SECTION.

BLACK & McDONALD LTD.

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2161-82-M Christian Labour Association of Canada, Applicant, v. **Carroll Electric (1982) Limited**, Respondent, v. Derek Murr, Employee

Damages – Practice and Procedure – Related Employer – Remedies – Prior Board decision declaring two employers related – Subsequent notice to one employer notice to other also – Prior order amended to reflect related employer status to facilitate enforcement against either employer – 1% drop in prime rate since filing date not causing Board to award interest at fluctuating rates

BEFORE: R. D. Howe, Vice-Chairman, and Board Members I. M. Stamp and E. G. Theobald.

APPEARANCES: W. R. Herridge, Hank Beekhuis and Paul Dodds for the applicant; Richard Nixon and George Takach for the respondent; no one appearing for the employee.

DECISION OF THE BOARD; December 23, 1983

1. In a decision dated August 17, 1983 (now reported at [1983] OLRB Rep. Aug. 1282) in respect of this matter, the Board made the following order (in paragraph 33):

To remedy the numerous breaches of the collective agreement described in this decision, the Board hereby directs that the respondent forthwith:

(1) pay to the applicant the sum of \$948.50, being the total amount of union dues which should have been deducted from the wages of the following grievors and remitted to the applicant pursuant to Article 6 of the collective agreement: Beverley Long (\$181.40), Gerald Smith (\$181.00), Derek Murr (\$181.00), Jim Gable (\$130.00), Ed Hill (\$104.00), Terry Pottelberg (\$87.90), and Gary Shackleton (\$83.20); (the amounts specified for each grievor have been deducted by the Board from the amount of damages which would otherwise have been payable to them by the respondent pursuant to subparagraph (2) of this order);

(2) pay to the following grievors the amounts specified, being the difference between the wages which they were paid by the respondent for work performed during the period in question, and the wages to which they were entitled under the collective agreement (less the amounts set forth in subparagraph (1) of this order, which amounts have been deducted by the Board from the damages which would otherwise have been payable to those grievors);

Beverley Long	\$ 92.13
Gerald Smith	\$1,980.76
Derek Murr	\$1,947.15
Jim Gable	\$1,573.75
Ed Hill	\$1,172.00
Terry Pottelberg	\$1,297.67
Gary Shackleton	\$ 698.90;

(3) pay to the following grievors the amounts specified, being the expenses incurred by them as a result of the respondent's failure to provide the "Major Medical Plan" benefits and O.H.I.P. coverage to which they were entitled under Article 12 of the collective agreement:

Gerald Smith	\$320.38
Ed Hill	\$ 61.48
Elwood Chapman	\$262.11
Earl Prouse	\$344.44
Terry Smith	\$162.00;

(4) pay to each of the grievors who have not yet received full vacation pay for 1982 pursuant to Article 9, the balance payable to them under that Article on the basis of the gross earnings to which they were entitled under the collective agreement, based upon their respective seniority dates as set forth in the seniority list marked as "Exhibit #1" in these proceedings;

(5) pay to each of the following grievors the sum of \$15.00, being the amount which each of them was entitled to receive at the end of 1982 for personal tool insurance, pursuant to Article 14.02 of the collective agreement: Beverley Long, Earl Chapman, Earl Prouse, Terry Smith, Gerald Smith, Derek Murr, Dale Woolley, Dan Murray, Jim Gable, Ed Hill, and Terry Pottelberg;

(6) pay to the following grievors the amounts specified, being the holiday pay which they were entitled to receive for Thanksgiving Day, pursuant to Article 10 of the collective agreement:

Earl Prouse	\$104.00
Terry Smith	\$104.00
Gary Shackleton	\$ 78.00;

(7) pay to the following grievors all wages, vacation pay, and other amounts (less union dues and benefit premiums that would have been deducted by the respondent pursuant to the collective agreement, and less the following amounts which they earned through their reasonable efforts to mitigate their respective losses: Elwood Chapman - \$225, Earl Prouse - \$1,100, and Terry Smith - \$350) which they would have received pursuant to the collective agreement by working the following number of (regular, non-overtime) hours, which the Board finds that they would have

worked if the respondent had not breached Articles 2.03, 11, and 18.02 of the collective agreement:

Elwood Chapman	640 hours
Earl Prouse	1,080 hours
Terry Smith	580 hours

(8) pay interest on the compensation ordered by the Board, said interest to be calculated by analogy to the formula described in Practice Note No. 13 dated September 8, 1980.

2. As indicated in paragraph 34 of that decision, the Board specifically remained seized of this matter in the event that any dispute arose concerning the interpretation or implementation of that order. Moreover, the Board has the power, under section 106(1) of the *Labour Relations Act*, to reconsider at any time any decision, order, direction, declaration or ruling made by it, and to vary or revoke any such decision, order, direction, declaration or ruling.

3. At the request of the applicant, a further hearing was scheduled to be held on December 6, 1983 in respect of this matter. Having regard to the notice of hearing and the correspondence from the applicant and its counsel which was forwarded to counsel for the employer prior to the hearing, we are satisfied that counsel for the employer knew, or should have known, that the matters to be dealt with at that hearing included the quantification and finalization of the aforementioned order, and the applicant's request that the style of cause of this application be amended to read "Carroll Electric (1982) Limited and J. B. Carroll Electric Limited", to reflect the fact that in a decision dated August 2, 1983 in Board File No. 1216-82-R (reported in [1983] OLRB Rep. Aug. 1275), another panel of the Board declared those two companies to be one employer for the purposes of the *Labour Relations Act*.

4. In its decision dated August 2, 1983, that other panel of the Board wrote, in part, as follows:

1. This matter arises pursuant to applications under sections 1(4) and 63 of the *Labour Relations Act*. By decision dated December 20, 1982, the Board decided that the evidence before it allowed the Board to conclude that there had been a sale of a business pursuant to section 63(2). The Board concluded that it was unnecessary in the circumstances to make any findings in connection with the section 1(4) application. The Board indicated it would remain seized if there was any difficulty implementing its decision.

2. On May 26, 1983 the applicant [Christian Labour Association of Canada] wrote to the Board requesting three orders, namely:

(1) to consider and determine the applicant's application under section 1(4) for a declaration that the two respondents [Carroll Electric (1982) Limited ("Carroll Electric") and J. B. Carroll Electric Limited ("JBC")] should be treated as constituting one employer for the purposes of the *Labour Relations Act* from and after September 20th, 1982.

(2) In connection with the foregoing, to order both respondents to adduce evidence in accordance with the duty imposed by section 1(5) concerning all matters occurring up to the date of the hearing which are relevant to the issues raised by the applicant's application.

(3) In connection with the foregoing, to rely on evidence heard in hearings herein November 1st, 1982 and to hear fresh evidence on matters which were discovered or occurred after that hearing. The nature of that evidence is described in the body of this letter.

The balance of this letter was devoted to setting out the facts and circumstances which caused the applicant to make these requests.

3. The Board convened a hearing on June 27, 1983, to consider the matters raised in the applicant's letter. At the outset of the hearing the Board, by unanimous ruling, announced to the parties the following:

(1) During the original proceedings the application under section 1(4) was seen as an alternate if section 63 was not found; there was no argument that *both* ought to be applied.

(2) There was sufficient evidence before the Board at the close of the original proceedings to conclude that section 1(4) could be applied.

(3) The parties were therefore to address their evidence and argument as to why the Board ought to exercise its discretion and grant the section 1(4) application at this point in time.

4. The Board will not set out all of the evidence from the previous day's hearing because the repetition is unnecessary. There is no dispute that at the time of the Board's decision of December 20, 1982, there was a collective agreement between the applicant and J. B. Carroll Electric Limited (hereinafter "JBC") which was due to expire March 31, 1983. After the decision was released, grievances were lodged pursuant to section 124 of the Act by the applicant on January 12th, 13th and 14th (Board File No. 2161-82-M) wherein it was alleged that Carroll Electric (1982) Ltd. (hereinafter "Carroll Electric"), the company to whom the business of JBC was sold, was not observing the provisions of the collective agreement. Six hearing days were necessary for these grievances, the last of which was May 18, 1983. As of June 27, 1983, the date of our hearing, no decision had been rendered....

7. The applicant argued that we should exercise our discretion under section 1(4) because there has been a continuing refusal by Carroll Electric to abide by the collective agreement, as part of a continuing pattern of conduct by the Carrolls to rid themselves of the union. This is shown by the issues which were ultimately on the bargaining table, i.e., union security and grievance procedure, not wages. Any steps which the applicant

could take by way of bad faith bargaining charges or section 124 applications would be futile because the two companies have arranged their affairs so that Carroll Electric is essentially a shell company. Section 1(4) is the best remedy in the circumstances because the real assets of Carroll Electric will be exposed.

8. The respondent, JBC, argued that section 1(4) is not a "curative section". Grievances have been filed under the collective agreement and those grievances did not involve JBC. It was never a party and should not have an order impacting on it where it had no opportunity to make representations. The applicant could have brought its section 124 against JBC but did not. It should not be allowed to use section 1(4) to cure this procedural defect. The respondent also claimed that the applicant has delayed resurrecting its section 1(4) so long as to have deprived itself of its benefit. The letter of May 26, 1983 came 7 months after the release of the Board's decision and some 8 months after the conclusion of the hearing. The respondent JBC argues that if the applicant is having problems negotiating with Carroll Electric or any other difficulties which may amount to a contravention of the Act, it should apply under section 89, not by way of section 1(4). Finally, the respondent argued it would be grossly unfair of the Board to continue this hearing on the basis of evidence already submitted.

9. The applicant in reply indicated that the only real argument against the imposition of section 1(4) at this stage is the impact it would have vis-a-vis the section 124 application. However, this is not sound because J. B. Carroll knew up until release of the Board's decision that it was potentially exposed in any grievances and it could have protected its interests by encouraging Carroll Electric to conduct its affairs in accordance with the collective agreement. The section 124 proceedings were occasioned by Carroll Electric's attempt to avoid the collective agreement. It was the original reason for the creation of Carroll Electric in September of 1982. The applicant questioned whether the formal presence of JBC at the section 124 proceedings would have changed them in any way. Also, having participated in creating Carroll Electric (in all the ways described in evidence from the previous days' hearings), JBC cannot now complain it should have been at the section 124 proceedings. The prejudice the respondent JBC asserts is "prejudice in the air" because the respondent was unable to describe the exact nature of the prejudice. The prejudice never existed because JBC and Carroll Electric were always one company according to the tests under section 1(4). With respect to the delay, the applicant claims it was simply giving the respondent Carroll Electric the benefit of the doubt, believing it was better to try to bargain a collective agreement and resolve differences without further litigation.

10. Section 1(4) provides:

Where, in the opinion of the Board, associated or related activities

or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

This section is different in emphasis from section 63 but their purposes are essentially the same, i.e., to preserve established bargaining rights and collective agreement(s). If the criteria for the application of section 63 are met, the Board has no discretion to refuse to make the declaration that a sale has occurred. The difference in section 1(4) is that the granting of an order pursuant to it is within the discretion of the Board (see *Radio Shack*, [1979] OLRB Rep. July 689). The question before us is whether this discretion ought to be exercised in the circumstances of the present case.

11. One of the factors which influences the Board's discretion is whether there has been anti-union animus (see *Acto Builders (Eastern) Limited*, [1972] OLRB Rep. June 465). To this extent section 1(4) is "curative". One of the factors which causes the Board to refuse to exercise its discretion under section 1(4) is proof that the applicant has unreasonably delayed in bringing its application (see *Farquhar Construction Ltd.*, [1978] OLRB Rep. Oct. 914; *Elwell & Sons.*, [1978] OLRB Rep. June 535).

12. Having regard to all the evidence and the submissions of the parties, we have decided that our discretion ought to be exercised in favour of granting the declaration requested. We are convinced that the motives which we have found in our previous decision to have lain behind the creation of Carroll Electric have caused the two companies to arrange their affairs in such a way as to avoid fulfilling the obligations under the collective agreement.... [The Board's review of the facts has been omitted.] For all these reasons we have concluded that the two respondents have arranged their affairs so that any liability which Carroll Electric incurs in its alleged avoidance of its collective agreement responsibilities will be unrecoverable because it is essentially, through special arrangements with JBC, an assetless company.

13. We have determined that at all material times there has been, and continues to be, a scheme of avoidance of collective bargaining duties and responsibilities which even extends to intentionally creating and maintaining a leasing arrangement which allows Carroll Electric to be virtually without assets against which the union could move.

14. For all these reasons we have determined that our discretion ought to be exercised in favour of declaring that JBC and Carroll Electric are associated or related companies within the meaning of section 1(4). We do not consider that JBC had been prejudiced in this declaration being made at this time. Except in unusual cases where the Board considers it appropriate to expressly limit the normal operation of a section 1(4) declaration, such declaration is effective as of the date the employer commenced operating the related business (see *Norfolk Hospital Association*, 77 CLLC ¶14,094 (Div. Ct.), and *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219). We also do not think that the applicant has been guilty of sleeping on its rights. Prompt application was made in September and the applicant cannot be faulted for having the confidence, after the Board's decision of December 20, 1982, that the situation between itself and the respondents would be thereby rectified. The Board had the similar confidence in issuing a decision which only dealt with part of what the applicant requested. It appears that there is need for a section 1(4) declaration after all and, under the circumstances, we find it appropriate to grant it. Accordingly, the Board hereby declares that the respondents, Carroll Electric (1982) Limited and J. B. Carroll Electric Limited are, and have been since the inception of Carroll Electric (1982) Limited, one employer for the purposes of the *Labour Relations Act*.

5. In view of that decision, we find there to be no merit in Mr. Nixon's submission (which he advised us that he was raising in his capacity as a "friend of the Board") that the Board is without jurisdiction to consider the applicant's requested amendment to the style of cause, because J. B. Carroll Electric Limited has not received notice of these proceedings. The effect of that declaration under section 1(4) of the Act is that Carroll Electric (1982) Limited and J. B. Carroll Electric Limited are, and have been since the inception of Carroll Electric (1982) Limited (in September of 1982), one employer for the purposes of the *Labour Relations Act*. Thus, as a matter of law, notice (in respect of proceedings under the *Labour Relations Act*) to Carroll Electric (1982) Limited is also notice to J. B. Carroll Electric (1982) Limited since they are one employer for the purposes of the Act. Moreover, notice to J. B. Carroll Electric Limited is unnecessary since we are not called upon to determine in these proceedings whether the assets of J. B. Carroll Electric Limited should be available to satisfy the Board's order in this case. That decision has already been made by the other panel in its aforementioned decision dated August 2, 1983, which decision was issued following a hearing at which both Carroll Electric (1982) Limited and J. B. Carroll Electric Limited were represented by counsel. It is neither necessary nor appropriate to permit that issue to be relitigated in the present proceedings.

6. The reason for the requested amendment to the style of cause is set forth as follows in a letter dated October 7, 1983 from Mr. Herridge (counsel for the applicant) to the Board, a copy of which letter was provided to Mr. Nixon (counsel for the employer) well in advance of the December 6th hearing:

On August 31st, 1983, we wrote to the Board in this matter requesting that the Board amend its decision herein dated August 2nd, 1983, by amending the style of cause to add J. B. Carroll Electric Limited as a named Respondent and by amending subparagraph (6) of paragraph 33

of the decision to delete the name Gary Shackleton and substitute the name Milt Smith.

We are in receipt of a copy of Mr. Nixon's letter of September 20th, commenting on our request. We note Mr. Nixon does not take exception to the amendment of subparagraph (6) of paragraph 33 of the decision. We will confine our comments to his objection to the amendment to the style of cause.

Mr. Nixon says he can see no reason why the style of cause in this matter should be amended. We submit the reason for the amendment is readily apparent. The Board's decision of August 2nd, 1983 in Board File No. 1216-83-R determined that J. B. Carroll Electric Limited and Carroll Electric (1982) Limited were to be treated as one employer for the purposes of the Act with effect from the date Carroll Electric (1982) Limited came into existence. This decision had the effect of making J. B. Carroll Electric Limited liable to satisfy the award released by the Board in this matter on August 17th, 1983. This particular consequence was foremost among the matters argued before the Board in the hearings which led to the decision of August 2nd, 1983, Board File No. 1216-82-R, as is reflected in that decision itself.

As you know, by letter dated September 22nd, 1983, our client has requested that the panel seized of this matter reconvene to determine certain issues which that panel left to the parties to resolve. That request was made necessary by the fact that the Carroll Electric companies have refused to engage in any discussion of the issues left to the parties by the Board decision of August 17th. Furthermore, there has been no payment of or on account of any of the amounts expressly awarded against Carroll Electric (1982) by that decision. It is apparent to us that the concerns which led to our reconsideration request in Board File No. 1216-82-R remain valid, and that no effective enforcement of the Board's decision will be possible without registration of all relevant Board awards with the Supreme Court of Ontario for enforcement against both Carroll Electric companies.

Once the appropriate Board decisions are filed with the Court, we would be seeking the appropriate Writs of Execution against the assets, both of Carroll Electric (1982) Limited and J. B. Carroll Electric Limited. We would anticipate some difficulty obtaining such Writs of Execution if the style of cause on the decision in this matter did not expressly name J. B. Carroll Electric Limited. We expect the Registrar of the Supreme Court of Ontario might take the view that his function is limited to the registration and enforcement of decisions, and does not extend to interpreting the interplay between two or more Board decisions, which he might feel would more appropriately be the function of the Board.

We submit that the interconnection of these decisions will be clear to the Board beyond any doubt. We are further of the view that the amendments sought should be granted *ex debito justitiae*, and this is no less so merely because the Respondents state they are unable to perceive the reason for the amendment. As that is the only reason given for their objection, we urge the Board to order that the amendment be made immediately.

In the event the Board considers that any hearing is necessary to resolve this issue, we would ask that this matter be dealt with by the panel seized of this matter when it reconvenes to deal with the issues left outstanding by the last decision. In the circumstances, we would respectfully request that the hearing of all those outstanding issues be expedited.

7. Although we agree with counsel for the applicant that the Registrar of the Supreme Court should not be expected to interpret the interplay of two or more rather complex Board decisions, we are not persuaded that it is necessary to amend the style of cause in these proceedings in order to meet the legitimate concern raised in that letter and in counsel for the applicant's oral submissions before the Board on December 6, 1983. As indicated above, we agree with counsel for the applicant that, as a matter of law, J. B. Carroll Electric Limited and Carroll Electric (1982) Limited are, and have been since September of 1982, one employer for purposes of the *Labour Relations Act* and that, accordingly, the assets of both companies are susceptible to legal process for the purpose of satisfying the Board's order in these proceedings (once the order has been filed in the office of the Registrar of the Supreme Court of Ontario and entered in the same way as a judgment or order of that court). However, rather than amending the style in this matter, we find it appropriate to merely vary the form of the order somewhat to reflect the Board's aforementioned section 1(4) declaration, and to eliminate the administrative difficulties that might otherwise be encountered by the applicant in seeking to enforce that order against both corporations.

8. Prior to the commencement of the hearing of this matter on December 6, 1983, the representatives of the parties met and agreed (in writing) that the following are the amounts payable pursuant to the Board's order in this matter:

1. Union Dues	\$ 948.50
2. Wage Difference	8,762.26
3. Major Medical	906.81
4. Vacation Pay	2,855.68
5. Tool Allowance	165.00
6. Thanksgiving holiday	286.00
7. Elwood Chapman	8,095.00
Earl Prouse	12,940.00

Terry Smith

7,190.00
<hr/> 42,149.25

Interest to March 11/83

1,264.48
<hr/> \$43,413.73

(That agreement concerning quantum of damages was made without prejudice to the application for judicial review of the Board's August 17, 1983 decision in this matter, which has been filed by the employer.) The parties are also in agreement that subparagraph 6 of paragraph 33 of the Board's order should be amended to substitute "Milt Smith" for "Gary Shackleton".

9. As indicated above, the parties have agreed that the interest payable to March 11, 1983 in respect of this matter is \$1,264.48. With respect to the interest payable after that date, counsel for the employer contended that the applicable interest rate should be the Bank of Canada interest rate as it exists from time to time. In support of his position that the interest rate payable in respect of a Board order should vary from month to month with the Bank of Canada rate, Mr. Nixon noted that interest rates have fallen since the complaint was filed, and submitted that failure to take such decreases into account in determining the interest payable would provide the applicant (and the grievors) with a "windfall". He also suggested that the Board's Practice Note No. 13 is ambiguous concerning the applicable rate since it refers (in paragraph 4) not only to the "monthly prime rate", but also to the "Bank of Canada interest rate".

10. Counsel for the applicant, on the other hand, submitted that it is clear from paragraph 3 of Practice Note No. 13 that the "appropriate annual interest rate normally applied is the prime rate as determined and published by the Bank of Canada in the *Bank of Canada Review* for the month in which the complaint [or application] was filed with the Board". Although he agreed that a reduction in the applicable interest rate is appropriate in the circumstances of this case, he contended that it would be undesirable for the Board to tie the interest rate payable to the prime rate as it exists from time to time as that would make the calculation of interest unduly complex. It was his position that substantial justice would be done if the Board fixed the rate payable from March 11, 1983 at 11%.

11. The present application was filed with the Board on January 19, 1983. Under the approach generally applied by the Board in awarding interest, as set forth in Practice Note No. 13, the interest rate payable on the Board's award would be 12%, which is the "prime rate" for January of 1983, as determined and published by the Bank of Canada in the *Bank of Canada Review*. It is clear from Practice Note No. 13, read as a whole, and from the Board's decision in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35, that the applicable interest rate is not (as suggested by counsel for the employer) the rate which the Bank of Canada charges on its loans to chartered banks, but rather the "prime rate", which is referred to in the *Bank of Canada Review* as "chartered banks rate on prime business loans". The Board's use of the "prime rate" parallels the approach adopted by the courts pursuant to section 36 of the *Judicature Act*, R.S.O. 1980, c. 223, as am., which provides, in part, as follows:

36(1) In this section, "prime rate" means the lowest rate of interest quoted by chartered banks to the most credit-worthy borrowers for prime business loans, as determined and published by the Bank of Canada.

Under that provision, unless a judge disallows interest, fixes a higher or lower interest rate, or allows interest for another period, a person entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest at the prime rate existing for the month preceding the month in which the action was commenced, from the date the cause of action arose (where judgment is given upon a liquidated claim), or from the date the person entitled gave notice in writing of his claim (where judgment is given upon an unliquidated claim) to the date of judgment. Under section 37 of that Act, a judgment bears interest from the time of giving judgment, at the prime rate for the month preceding the month in which the judgment was given (unless otherwise ordered).

12. We are in agreement with Mr. Herridge's submission that the formula for the calculation proposed by Mr. Nixon should not be adopted by this Board. As noted by the Board in *Hallowell House Limited*, *supra*, at paragraph 31:

The method of calculation appropriate for this Board must be easily understood and readily administered. Laymen regularly appear before the Board either representing themselves or appearing as agents for complainants. The beneficial effect of the Board's interest award would diminish greatly if recipients had to seek legal [or accounting] advice to properly calculate the interest.

The formula advocated by Mr. Nixon is, in our view, too complex to be workable. It is also inconsistent with the approach generally applied by the Ontario courts (as described above). The formula set forth in Practice Note No. 13 has been adopted by the Board because it provides "ease of calculation, flexibility and basic accuracy" (see paragraph 33 of the *Hallowell* decision). In some circumstances it may, of course, be appropriate to modify that approach somewhat. For example, while halving the wage portion of an award is appropriate in calculating the interest payable on the wage portion of an award, in order to reflect the fact that the total wage loss experienced by an employee does not occur all at once, but rather accumulates with each pay period following the discharge (or failure to recall the employee), such division is not appropriate in respect of amounts which do not accrue over time (such as the Thanksgiving Day holiday pay referred to in paragraph 6 of the Board's order of August 17, 1983 in this matter).

13. As is apparent from reading Practice Note No. 13 and the *Hallowell* decision which preceded it, the Board's focus in respect of the interest calculation has generally been on interest prior to the date of the Board's award. For the reasons set forth above, in the absence of compelling circumstances such as a dramatic change in the prime rate, the Board will generally direct (by reference to Practice Note No. 13) that the applicable rate of interest is "the prime rate as determined and published by the Bank of Canada in the *Bank of Canada Review* for the month in which the complaint [or application] was filed with the Board". If any of the parties to a proceeding before the Board are of the view that special circumstances exist which make it appropriate to depart from that approach, they should specifically address that issue during their closing arguments before the Board renders its decision. (No such submissions were made when this case was argued on its merits in May of 1983.)

14. Board decisions do not generally address the matter of post-decision interest since the Board assumes that, for the most part, respondents will duly comply with Board orders forthwith. In the event that a respondent (such as the employer in the present case) does not do so, then section 124(3) of the *Labour Relations Act* (by specifically making section 44(11) of the Act applicable to section 124 referrals) and section 89(6) (to the extent that it is applicable to the present proceedings) provide for a copy of the Board's decision (exclusive of the reasons therefor) to be filed in the office of the Registrar of the Supreme Court whereupon it "shall be entered in the same way as a judgment or order of that court and is enforceable as such". Once a Board decision has been entered as a judgment by the Supreme Court, it presumably will bear interest at the prime rate for the month preceding the month in which it was so entered, by virtue of section 37 of the *Judicature Act*. (See also in this regard Rule 548 of the Rules of Practice made pursuant to that Act.) If section 36 and Rule 548 do not apply to such decision, then the interest rate which will continue to apply (pursuant to the Board's order) will be the prime rate for the month in which the complaint was filed with the Board (unless otherwise indicated by the Board in its order).

15. The prime rate for the month in which the present complaint was filed (that is, January of 1983) was 12%. The prime rate declined to 11.5% in February and remained at 11.5% in March. In April of 1983 it fell to 11% and has remained unchanged at that level to and including November of 1983 (which is the most recent monthly "prime rate" available to the Board at the time of this decision). It is open to serious question whether a drop of 1% in the prime rate between the date of filing of a complaint or application, and the date on which the Board begins to hear the merits of the application (or complaint) would prompt the Board to depart from its usual practice with respect to interest. However, it is unnecessary to express a final view concerning that matter in the present case in view of the fact that, as indicated above, it is applicant's position that substantial justice will be done in this case if the Board fixes the interest rate payable from March 11, 1983 at 11% (which is the lowest rate that would be applicable even if the Board were to adopt the approach advocated by counsel for the employer). Accordingly, the Board's revised order in respect of this matter will direct payment of interest at the rate of 11% from March 11, 1983 to the date of payment.

16. For the foregoing reasons, the Board hereby directs that the employer, which by virtue of the declaration contained in the Board's decision dated August 2, 1983 in File No. 1216-82-R consists of Carroll Electric (1982) Limited *and* J. B. Carroll Electric Limited, forthwith:

(1) pay to the applicant the sum of \$948.50, being the total amount of union dues which should have been deducted from the wages of the following grievors and remitted to the applicant pursuant to Article 6 of the collective agreement: Beverley Long (\$181.40), Gerald Smith (\$181.00), Derek Murr (\$181.00), Jim Gable (\$130.00), Ed Hill (\$104.00), Terry Pottelberg (\$87.90), and Gary Shackleton (\$83.20); (the amounts specified for each grievor have been deducted by the Board from the amount of damages which would otherwise have been payable to them by the employer pursuant to subparagraph (2) of this order);

(2) pay to the following grievors the amounts specified, being the difference between the wages which they were paid by the employer for work performed during the period in question, and the wages to which

they were entitled under the collective agreement (less the amounts set forth in subparagraph (1) of this order, which amounts have been deducted by the Board from the damages which would otherwise have been payable to those grievors):

Beverley Long	\$ 92.13
Gerald Smith	\$1,980.76
Derek Murr	\$1,947.15
Jim Gable	\$1,573.75
Ed Hill	\$1,172.00
Terry Pottelberg	\$1,297.67
Gary Shackleton	\$ 698.80;

(3) pay to the following grievors the amounts specified, being the expenses incurred by them as a result of the employer's failure to provide the "Major Medical Plan" benefits and O.H.I.P. coverage to which they were entitled under Article 12 of the collective agreement:

Gerald Smith	\$320.38
Ed Hill	\$ 61.48
Elwood Chapman	\$262.11
Earl Prouse	\$344.44
Terry Smith	\$162.00;

(4) pay to the applicant, for distribution to the applicable grievors, the sum of \$2,855.68, being the balance of vacation pay for 1982 payable to the grievors pursuant to Article 9 of the collective agreement;

(5) pay to each of the following grievors the sum of \$15.00, being the amount which each of them was entitled to receive at the end of 1982 for personal tool insurance, pursuant to Article 14.02 of the collective agreement: Beverley Long, Earl Chapman, Earl Prouse, Terry Smith, Gerald Smith, Derek Murr, Dale Woolley, Dan Murray, Jim Gable, Ed Hill, and Terry Pottelberg;

(6) pay to the following grievors the amounts specified, being the holiday pay which they were entitled to receive for Thanksgiving Day, pursuant to Article 10 of the collective agreement:

Earl Prouse	\$104.00
Terry Smith	\$104.00
Milt Smith	\$ 78.00;

(7) pay to the following grievors the amounts specified, being the wages, vacation pay, and other amounts (less union dues and benefit premiums that would have been deducted by the employer pursuant to the collective agreement, and less the following amounts which they earned through their reasonable efforts to mitigate their respective losses: Elwood Chapman - \$225, Earl Prouse - \$1,100, and Terry Smith - \$350) which they

would have received pursuant to the collective agreement by working the following number of (regular, non-overtime) hours, which the Board finds that they would have worked if the employer had not breached Articles 2.03, 11, and 18.02 of the collective agreement: Elwood Chapman – 640 hours, Earl Prouse – 1,080 hours; and Terry Smith – 580 hours:

Elwood Chapman	\$ 8,095.00
Earl Prouse	\$12,940.00
Terry Smith	\$ 7,190.00;

(8) pay to the applicant for distribution to itself and to the applicable grievors, interest in the amount of \$1,264.48, being the interest payable on the compensation awarded by this order to March 11, 1983; and

(9) pay to the applicant for distribution to itself and to the applicable grievors, interest on the compensation awarded by this order, at the rate of 11% per annum, from March 11, 1983 to the date of payment.

0290-83-U International Woodworkers of America Local 2-69, Complainant, v. Consolidated Bathurst Packaging Ltd., Respondent

Natural Justice – Practice and Procedure – Reconsideration – Respondent claiming Board decision rendered void because matter was discussed at “Full Board” meeting by panel – Seeking new hearing before different panel – Decision reviewing nature of Board and its responsibility – Setting out need for and scope of full board and other consultation procedures – Decision solely matter for panel seized of matter – No breach of natural justice

BEFORE: George W. Adams, Q.C., Chairman, and Board Members W. H. Wightman and B. K. Lee.

DECISION OF THE BOARD; December 9, 1983

1. The respondent seeks reconsideration of the Board’s decision rendered on September 30, 1983.

2. In this request three grounds are set out. They are:

The Respondent, Consolidated-Bathurst Packaging Limited, requests reconsideration of the decision of the Board in this matter on the grounds and circumstances following:

1. The Board engaged in an improper and illegal practice in the course of reaching its decision which such practice on its face vitiates the award ab initio and requires that the case be heard by a new and independent

panel of the Board, no member of which has been exposed to any of the evidence heard by the original panel of the Board.

2. That the Chairman of the Board improperly expanded the scope and basis of Union counsel's complaint to an extent and degree that took away from the Company and its counsel the opportunity of reply to which it is, by law, entitled.

3. That the majority failed utterly to consider evidence properly before it and recapitulated evidence in such a way as to disclose not only a number of errors in finding but also a failure to make findings of evidence adduced before the Board which precluded those others who participated in the decision making from any opportunity to fairly consider the case which was put before the panel at first instance.

3. In its first submission, the respondent states that the Board engaged in an improper post-hearing practice if it held a meeting of the entire Board at which evidence heard by the three person panel rendering the decision was discussed or at which views were solicited or expressions of opinion elicited from the members of the Board, other than those who heard the instant case. The submission, in this respect, reads:

In support of the first proposition put before you and the basis upon which reconsideration of decision is requested, I bring to your attention the following facts:

1. On the 23rd day of September, 1983 I attended at the Ontario Labour Relations Board, #400 University Avenue, for the purposes of a scheduled hearing between the Retail, Wholesale & Department Store Union and the client by which I had been retained for that hearing, Knob Hill Farms Ltd.

During the course of that day, and by reason of certain settlement discussions which were being engaged in with the assistance of Ontario Labour Relations Board Settlement Officer, Wilson, I had occasion to attend at the second floor (cafeteria), the first floor, the fourth floor, and the sixth floors of premises municipally known as #400 University Avenue, all of which floors (with the exception of the cafeteria) are occupied by the Ministry of Labour of the Province of Ontario.

2. At exactly 11.56 a.m. on the morning of September 23rd, as I got off the elevator at the sixth floor, (a floor occupied by the Ontario Labour Relations Board and utilized for the purposes of hearing rooms and offices for various members of that tribunal), I found myself standing directly in front of a desk which was occupied by a person who subsequently identified herself to me as Dianne Smith, a Clerk in the employ of the Ontario Labour Relations Board.

3. At that time I overheard Board Member J.W. Murray say to her, in response to a question which I did not hear, "I won't be there. I am going to that full Board meeting."

4. As a practitioner who has been practising before the Ontario Labour Relations Board since the year 1969 I have come to be aware of a practice which the Ontario Labour Relations Board has adopted wherein cases, considered by it to be of a significant nature or impact, are discussed at meetings of the full Board. I have not, however, heretofore been aware that any case in which I have been involved has in fact been discussed at such a meeting.

5. By reason of the fact that I had, some weeks before the 23rd day of September, 1983, completed evidence and argument in a case between my client Consolidated Bathurst Packaging Limited and the International Woodworkers of America, Local 2-69 which I believed to be of some significant import in terms of the development of Ontario Labour Relations Board jurisprudence and because I was not aware that a decision in respect of that particular hearing had yet been released, I asked Mr. Murray if the purpose of the full Board meeting was to discuss the Consolidated-Bathurst Packaging Limited case relating to the Company's closure of its plant in Hamilton, Ontario.

6. Board Member J.W. Murray refused to answer my question.

7. Subsequently, and at the hour of 12:20 p.m. while I was in the presence of an Associate from my firm, Thomas A. Stefanik, Esq., and one Mr. Howard Wood, the solicitor from whom I take instructions at Knob Hill Farms Ltd., and while we were in the second floor cafeteria at the premises municipally known as #400 University Avenue, as aforesaid, having discussions with Ontario Labour Relations Board Officer Norman Wilson, our conversation was interrupted by Mr. R.O. MacDowell, a Vice-Chairman of the Ontario Labour Relations Board as aforesaid, who asked to speak to Mr. Wilson for a moment.

8. As Mr. MacDowell and Mr. Wilson left the table where we were sitting I said to Mr. MacDowell, "when is your full Board meeting?" Mr. MacDowell looked at his wrist watch and said to me "in about ten minutes".

9. Subsequently, and at the hour of 1:45 p.m., I attended on the third floor of the premises as aforesaid at the offices of the Solicitor of the Ontario Labour Relations Board, Harry Freedman, Esq. At that time I spoke to two young women, whose names are not known to me, and asked them if the Board Solicitor was in his office and available to talk to me. I was advised that Mr. Freedman was not in his office but, rather, was in Court. I then asked to speak to his Assistant and was advised that he was absent attending a meeting of the "full-Board"

10. I then inquired where the meeting of the "full-Board" was being held and was advised that the said meeting was being held in Board Room "E" on the sixth floor of the premises as aforesaid.

11. I immediately went up to the sixth floor of the premises as aforesaid and noted that the door to Board Room "E" was closed. Although I could overhear that there was conversation taking place in the said room, I was not able to hear what was being said.

12. Subsequently, and at about the hour of 1:55 p.m., and in view of developments which had taken place in the settlement discussions involving the Knob Hill case, I felt it important to speak to the Vice-Chairman of the panel which had carriage of that matter on that day, Mr. R.O. MacDowell. Accordingly I attended at Board Room "E", knocked, and opened the door. When I opened the door I saw the said J.W. Murray sitting at a table with a number of people whom I was not able to recognize. I did not see Mr. MacDowell and as it was obvious that there was a meeting going on in the room I withdrew.

13. Subsequently, I sat in an office located beside Board Room "E" with the said Mr. Howard Wood and used it as a "consulting room" for the purposes of the ongoing discussions with Ontario Labour Relations Board Officer Norman Wilson, as aforesaid. Throughout our meeting as aforesaid the door to the consulting room remained open and I was able to observe persons coming out of Board Room "E".

14. At about the hour of 2:13 p.m. I observed an individual known to me as C.A. Ballentine, and identified in the December 1981 copy of the "Rules of Procedure, Regulations and Practice Notes" of the Ontario Labour Relations Board as being a full-time member of the Board, come out of the said Board Room. As the said C.A. Ballentine came out of the said Board room, I approached him and said: "Clyde, can I speak to you for a minute?" The said Mr. Ballentine stopped, came over to me, and I then said to him: "Is that the Consolidated-Bathurst case that they are discussing in there?" The said C.A. Ballentine replied to me and said: "Yes, that's what they are doing. It looks like it will go on all afternoon."

15. Immediately following that discussion the said C.A. Ballentine went into Board Room "D" together with two other individuals who had come out of Board Room "E", namely, R.A. Furness, Esq., identified in the said Rules of Procedure, Regulations and Practice Notes as being a full-time Vice-Chairman of the said Ontario Labour Relations Board, and one J.T. Wilson, identified in the said Rules of Procedure, Regulations and Practice Notes as being a full-time member of the Board.

16. At the hour of 2:26 p.m., I observed an individual known to me as one N. Dissanayake, a Solicitor in the employ of the Ontario Labour Relations Board and another individual known to me as Ms. Meslin, who

is an Assistant to the Chairman of the Ontario Labour Relations Board, coming out of the said Board Room "E".

17. At about the hour of 2:32 p.m. I observed a person known to me as Kevin M. Burkett, Esq., and identified in the said Rules of Procedure, Regulations and Practice Notes, as an alternate Chairman of the Ontario Labour Relations Board, come out of the said Board Room "E".

18. At the hour of 2:35 p.m., I observed an individual known to me as M.G. Mitchnick, Esq., identified in the said Rules of Procedure, Regulations and Practice Notes, as a full-time Vice-Chairman of the Ontario Labour Relations Board, leave the said Board Room "E".

19. At the same time I observed an individual known to me as Corinne Murray, a Vice-Chairman of the said Ontario Labour Relations Board, leave the said Board Room "E".

20. At approximately the hour of 2:40 p.m., I observed the said R.O. MacDowell, Esq., together with an individual known to me as F. Stewart Cook, Esq., and an individual known to me as W.H. Wightman, Esq., both of whom are identified in the Rules of Procedure, Regulations and Practice Notes as full-time members of the said Board leave the said Board Room "E" and walk towards Board Room "C" for the purposes of recommencing a hearing involving my client Knob Hill Farms Ltd. and the Retail, Wholesale & Department Store Union, as aforesaid.

21. I immediately attended at Board Room "C" for the purposes of the resumption of the hearing between Knob Hill Farms Ltd. and the Retail, Wholesale & Department Store Union as aforesaid. As that hearing commenced before the said R.O. MacDowell, F. Stewart Cook and W.H. Wightman, it became important for the purposes of establishing future dates for hearing before the said panel of the Board to ascertain the whereabouts of the Registrar of the Ontario Labour Relations Board, D.K. Aynsley, Esq. Accordingly I addressed the said R.O. MacDowell and said: "I understand Mr. Aynsley is still in at the full Board meeting. Will I have to wait to get dates from him?" The said R.O. MacDowell replied and stated: "He should be in his office by now."

Submission with respect to the first ground:

On the facts as aforesaid it is clear that a so called "full Board" meeting was convened for the purposes of discussing both the evidence heard before the instant panel of the Board and for the purpose of eliciting the views of all of the members of the Board for the purposes of reaching a decision. It is not known whether or not a "draft award" was prepared for the purposes of such meeting or circulated to the members of the "full Board". However it is respectfully submitted that if any of the evidence heard before the instant panel of the Board was discussed at the full Board meeting and if any views were solicited or expressions of

opinion elicited from members of the Board other than those who heard the case then, and in such case, the Board has engaged in an improper and illegal procedure and its decision cannot stand.

If any evidence is to be heard by the full Board and any conclusions are solicited or elicited from the members of the Board other than those who heard the case at first instance then, and in such case, the full Board must hear all of the evidence at first instance.

4. It must be kept in mind that the Ontario Labour Relations Board is a relatively large tripartite administrative agency first established in 1944. See *The Labour Relations Board Act*, 1944, S.O. 1944, c.29. See also Willes, *The Ontario Labour Court*, 1943-44 (Queen's University Industrial Relations Centre, Kingston, 1979). The Board represented, and continues to represent, an important feature of Ontario's social and economic policies aimed at achieving industrial peace. Over the almost 40 years since the Board's inception the *Labour Relations Act* has, by amendment, been significantly widened. See O.L.R.B. Annual Report 1982-83, Chapter 2 "A History of the Act" at page 2-5. At the end of fiscal year 1982-83, the Board employed a total of 94 persons on a full-time basis. The Board has two types of employees. The Chairman, Alternate Chairman, vice-chairmen and Board members who are appointed by the Lieutenant Governor-in-Council. The appointments generally bear three year terms at the pleasure of the Lieutenant Governor-in-Council. The administrative, field and support staff are civil service appointees. The total budget of the Ontario Labour Relations Board for the fiscal year was \$4,272,800.00. In the same fiscal year the Board received a total of 2,762 applications and complaints. In addition to these cases, 427 were carried over from the previous year, making a total caseload of 3,189 cases in 1982-83. Of the total, 2,445 were disposed of during the year producing an average workload of 266 cases for the Board's full-time chairmen and vice-chairmen. Currently, the Board employs 12 full-time chairmen and vice-chairmen and 4 part-time vice-chairmen. There are 10 full-time Board members representing labour and management and another 22 part-time Board members representing the parties. Many of these part-time members are active labour relations practitioners and the involvement of labour and management on either a part-time or full-time basis in the administration of the statute constitutes, even today, a somewhat novel mechanism of self-regulation. The unique tripartite nature of the Ontario Labour Relations Board and the difficulty of strictly applying common law concepts such as bias to this agency are highlighted in Arthurs, H.W., *The Three Faces of Justice: Bias in the Tripartite Tribunal* (1963) 28 Sask. Bar Rev. 147.

5. Sections 102 and 103 establish the Board and set out many of its general procedural powers. Section 102(9) provides that the Chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum sufficient for the exercise of all the jurisdiction and powers of the Board and section 102(10) provides that the Board may sit in two or more divisions simultaneously so long as a quorum of the Board is present in each division. The Board refers to these divisions as panels. A decision of the majority of the members of a Board present and constituting a quorum represents the decision of the Board by section 102(11). This provision also provides that if there is no majority, the decision of the Chairman or the vice-chairman governs. By section 102(4) the Chairman is empowered to assign the members of the Board to its various divisions or panels. Today, the constitution of the Board, sitting in three person panels, lends itself to hundreds of different combinations of Board members and vice-chairmen who may sit on any

given case. What are the implications of these diverse panel configurations to the administration of the Act and to the attainment of the statute's objectives?

6. In considering this question, it is to be noted that the Act confers many areas of broad discretion on the Board in determining how the statute should be interpreted or applied to an infinite variety of factual situations. Within these areas of discretion, decision-making has to turn on policy considerations. At this level of "administrative law", law and policy are to a large degree inseparable. In effect, law and policy come to be promulgated through the form of case by case decisions rendered by panels. It is in this context that the Board is sometimes criticized for not creating enough certainty in "Board law" to facilitate the planning of the parties regulated by the statute. This criticism, however, ignores the fact that there is a huge corpus of Board law much of which is almost as old as the legislation itself and as settled and stable as law can be. Board decision-making has recognized the need for uniformity and stability in the application of the statute and the discretions contained therein. Indeed, it is because there is so much settled law and policy that upwards to 80% of unfair labour practice charges are withdrawn, dismissed, settled or adjusted without the issuance of a decision and that a high percentage of other matters are either settled or withdrawn without the need for a hearing. For example, in fiscal year 1982-83 the Board's eighteen labour relations officers were assigned a total of 1,680 cases to assist the parties to settle the differences between them without the necessity of formal litigation before the Board. The labour relations officers completed activity in 1,384 of the assignments obtaining settlements in 1,213 cases or 88%. Thus, there is great incentive for the Board to articulate its policies clearly and, once articulated, to maintain and apply them. Nevertheless, there remains, even in applying an established policy, an inevitable area of discretion in applying the statute to each fact situation. Moreover, the Board reserves the right to change its policies as required and new amendments to the Act create additional requirements for ongoing policy analysis. To perform its job effectively, the Board needs all the insight it can muster to evaluate the practical consequences of its decisions, for it lacks the capacity to ascertain by research and investigation just what impact its decisions have on labour relations and the economy generally. In this context therefore, and accepting that no one panel of the Board can bind another panel by any decision rendered, what institutional procedures has the Board developed to foster greater insightfulness in the exercise of the Board's powers by particular panels? What internal mechanisms has the Board developed to establish a level of thoughtfulness in the creation of policies which will meet the labour relations community's needs and stand the test of time? What internal procedures has the Board developed to ensure the greatest possible understanding of these policies by all Board members in order to facilitate a more or less uniform application of such policies? The meeting impugned by the respondent must be seen as only part of the internal administrative arrangements of the Board which have evolved to achieve a maximum regulatory effectiveness in a labour relations setting.

7. Since the inception of the Board, it has been understood that a division or panel which hears a case, ultimately, is alone responsible for deciding it. Panels deliberate on their own in executive sessions following the conclusion of hearings. At this session the vice-chairman is invariably charged with the responsibility of preparing a draft decision for the consideration of his or her two colleagues. The vice-chairman then, with or without the assistance of the two lawyers employed by the Board and their four articling law students, will undertake research in preparing the decision. This research may include a review of earlier Board decisions, applicable decisions rendered by labour relations boards in other jurisdictions, relevant court decisions, and the periodical literature in the fields of labour law and industrial relations.

The Board possesses one of the most complete libraries of industrial relations materials in the Province and employs a professional librarian to manage this information. A second executive session will usually be convened by the panel to consider the draft decision. Many representatives and parties who regularly appear before the Board have become expert in the Board's prior decisions and will refer to these decisions in the course of making submissions. However, many other parties may not be well prepared or versed in Labour Board policy and, in effect, leave it to the Board to explore its past decisions and any other material relevant to the rendering of an informed decision. The Board prides itself as an institution where laymen can present their own submissions and feel at home in doing so. In major cases, in an effort to administer the Act consistently and thoughtfully, a panel will always undertake its own research in addition to receiving the submissions of the parties. The statutory policy of achieving industrial peace demands that cases not turn on the level of preparation or understanding of the individuals involved in particular cases coming before the Board.

8. After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to make. These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province. But this institutional purpose is subject to the clear understanding that it is for the panel hearing the case to make the ultimate decision and that discussion at a "Full Board" meeting is limited to the policy implications of a draft decision. The draft decision of a panel is placed before those attending the meeting by the panel and is explained by the panel members. The facts set out in the draft are taken as given and do not become the subject of discussion. No vote is taken at these meetings nor is any other procedure employed to identify a consensus. The meetings invariably conclude with the Chairman thanking the members of the panel for outlining their problem to the entire Board and indicating that all Board members look forward to that panel's final decision whatever it might be. No minutes are kept of such meetings nor is actual attendance recorded. Those attending may also include the Board's senior civil service officials such as the Registrar and Chief Administrative Officer of the Board, its solicitors and, possibly, the Managers of Administration and Field Services. Other Board business as well is regularly conducted at these meetings.

9. "Full Board" meetings are as important to fashioning informed and practical decisions which will withstand the scrutiny of subsequent panels as is the research and reflection undertaken by the vice-chairmen in preparing their draft decisions. As learned articles, labour relations texts, memoranda prepared by Board lawyers and law students, and previous decisions of the Board can provide insightful guidance on difficult policy issues, so can general discussion with the experienced full and part-time management and labour Board members who make up the tripartite Board and who have to live with the decisions rendered by individual panels hearing cases. Indeed, in the absence of a formalized Full Board meeting, Board members and vice-chairmen would be driven to discuss their cases with each other informally in order to better appreciate the issues involved and to develop a level of understanding and insight consistent with the large measure of deference the labour relations system needs to be paid to rendered decisions. The "Full Board" meeting merely institutionalizes these discussions and better emphasizes the broad ranging policy implications of individual

decisions. The decisions therefore remain the individual decisions of particular panels and vice-chairmen. The "Full Board" meetings are merely reflective of the institutional setting in which these individual decisions are made.

10. The respondent's submission is really attempting to probe the mental processes of the panel which rendered the decision in question and in so doing ignores the inherent nature of judicial decision-making and administrative law making. See K. C. Davis, *Administrative Law Treatise* §17 (2d ed. 1980). In general, the deliberations of this panel were not unlike those engaged in by a judge sitting in court. The "Full Board" meeting, to the extent there is no judicial analogy, distinguishes an administrative agency from somewhat more individual common law judging. But, as an extra-record event, "Full Board" meetings are in substance no different than the post-hearing consultation of a judge with his law clerks or the informal discussions that inevitably occur between brother judges. Such meetings, we also suggest, have no greater or lesser effect than a judge's post-hearing reading of reports and periodicals which may not have been cited or relied on by the advocates. Is it seriously open for a litigant to question Supreme Court justices or other judges about their post-hearing reading, their thinking, and the contribution of their law clerks or brother judges to the ideas expressed in an opinion published under a justice's name? For example, could it be asked of a judge "Did you make a false start that your law clerk or brother judge in consultation corrected?" If such questions are improper for a judge, as we think they are, why are they not equally improper to be put to an administrator of an important public statute embracing a complex of socio-economic objectives. The respondent's submission might have some substance in the context of an administrative agency manned internally by a host of anonymous civil service advisors, some of whom may have a prosecutorial role and whose extra-record advice may be concealed by the absence of reasons. See for example Asimov, *When the Curtain Falls: Separation of Functions in Federal Agencies* (1981), 81 Columbia L.Rev. 759. However, in the case at hand, as is the practice of this Board, the decision rendered thinks out in writing every facet of the decision-making against an equally comprehensive recitation of the material facts found by the panel (together with a great deal of evidence) and the representations of the parties. This panel of the Board, chaired by the Board's Chairman, decided the respondent's case and for the reasons set out in the panel's decision.

11. We are also obliged to note that the respondent's lawyer is no stranger to this Board and, as his submissions indicate, had been well aware of the Board's longstanding practice he now challenges. Indeed, the respondent was represented by this same lawyer some months earlier when it brought a successful complaint against the same trade union causing the Board to rethink its approach to secondary picketing in an industrial context. The result was a significant change in Labour Board policy in this area of industrial relations and a "Full Board" was held as it was in the instant matter. See *Consolidated Bathurst Inc.*, [1982] OLRB Rep. Sept. 1274.

12. Before concluding our response to this first submission of the respondent, we also want to point out that consultation and research within the Ontario Labour Relations Board is not confined to "Full Board" meetings. The Chairman of the Board is the Chief Executive Officer and responsible for the Board's overall effectiveness. He assigns cases to panels and manages the settlement and administrative activities of the Board aided by highly competent civil service personnel. He responds to complaints made by the labour relations community, the general public, politicians, and by individuals through the Ombudsman. He is responsible, as well, for the Board achieving its overall objectives of contributing to industrial relations

peace by thoughtful and expeditious dispute resolution. To these ends, the Chairman chairs an administrative committee of civil servants and meets with vice-chairmen every Thursday at lunch meetings. Computerized case status print-outs are reviewed with vice-chairmen to assess the reasons why certain cases have not been issued within the model times. These lunch meetings, as well as constituting an instrument of Board management, provide a forum for the exchange of ideas between vice-chairmen. Difficult issues of principle that individual vice-chairmen are facing are discussed with the vice-chairman receiving whatever advice his colleagues are able to give. Once again, however, no vote is taken nor is any other mechanism for registering consensus employed. Everyone understands that ultimately the vice-chairman and his or her two Board member colleagues on the panel considering the case must decide the matter. Groups of labour and management Board members inevitably engage in the same type of discussions but on a more informal basis. The Ontario Labour Relations Board is more than just the sum of its individual panels and effective administrative action in a sophisticated labour relations environment demands this to be so.

13. In summary, a "Full Board" meeting in the case at hand was held at the request of the Chairman who was hearing the case after the panel had deliberated and prepared a draft decision. The draft decision was then placed before all Board members who attended and the decision was explained by the members of the panel to those in attendance. The facts as found by the panel were not the subject matter of the discussion. The discussion focussed on the implications of the labour law principles set out in the draft and applied to the facts as found. Unsolicited disclosure in collective bargaining – the issue involved in the case – is an area of great significance to effective and harmonious collective bargaining in this Province and it is fair to say that many of the labour and management Board members in attendance at the meeting gave their reaction to the principles and their application as set out in the draft decision. No vote, however, was held and no other mechanism for measuring consensus was employed. No minutes were kept of this meeting nor was the attendance recorded. In addition to Board members, the Registrar of the Board and its solicitors may have been in attendance. Following the meeting complained of, the panel which heard the case continued to deliberate and eventually rendered its decision. It is our view that the Full Board meeting procedure described above, as well as the other aspects of the Board's general internal deliberation process set out herein, comply with the principles of natural justice as they are understood in a modern administrative law context and, as well, accord with section 102(13) of the Act, which provides:

The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

14. In applying this latter provision, we believe the following comment of the Supreme Court of Canada made in *Bakery and Confectionary Workers International Union of America, Local 468 et al v. White Lunch Limited et al* (1966), 66 CLLC ¶14,110 in respect of the somewhat unique labour board power to reconsider, is apposite.

Whatever merit the arguments of the respondent had at the beginning of labour relations legislation, it seems to me that in the stage of industrial

development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of the legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-20th century.

The respondent's submissions ignore the institutional requirements of a modern administrative tribunal whose objective is to further harmonious relations between employers and employees. They also ignore the inherent nature of judging in both judicial and administrative settings. We, therefore, cannot accept that natural justice, sensibly applied, demands more than the fairness accorded to the respondent in this case.

15. With respect to the respondent's second submission, we accept neither its accuracy nor relevance. The submissions of the parties were set out as we understood them and the particular submission of the complainant questioned by the respondent was rejected no matter how construed.

16. The third submission alleges a failure by the Board to comment on all the evidence adduced before it and points to at least one alleged inaccuracy. The Board set out the evidence and found facts it considered relevant and necessary to an evaluation of the issues before it and the representation of the parties. No attempt was made to recite all of the evidence.

17. For all of these reasons, the request for reconsideration is denied.

2705-82-R Retail Clerks Union Local 409, Applicant, v. **Dominion Stores Limited**, Respondent, v. **Canada Safeway Limited**, Intervener

Employee – Practice and Procedure – Parties historically treating Asst. Store Managers as within managerial exclusion in existing collective agreement – Union applying for unit of Asst. Store Managers – Required to adduce clear evidence why change required – Status quo confirmed by Board

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *Cynthia Morton and Ian Reilly for the applicant; Vid Juodgudis for the respondent; D. I. Wakely and P. J. Thorup for the intervener.*

DECISION OF THE BOARD; December 12, 1983

1. This is an application for certification involving the two stores operated by Dominion Stores Limited in the City of Thunder Bay. All parties acknowledge that, as a result of recently taking over the two stores, Canada Safeway Limited is now the employer of the individuals in question. Canada Safeway was accordingly permitted by the Board to make submissions on the Labour Relations Officer's report.

2. The bulk of the employees at the two stores, up to and including the rank of department head, have long been covered by a collective agreement. Assistant Store Managers, however, have historically been excluded, in the words of the collective agreement, as "persons above the rank of department head", and the present application applies only to them. The respondent takes the position that the assistant store managers exercise "managerial functions", and the applicant, notwithstanding the fact that the collective agreement has apparently excluded them over the years on this basis, takes the position that they do not.

3. As the Board noted in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, the evidentiary onus normally rests on a party seeking to exclude an individual from the coverage of the statute. On the other hand, however, the Board went on to note, at page 1126:

- (2) A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years, must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.

Or, as the Board put it in *Sudbury & District Hospital*, (unreported) Board File No. 2005-79-M released March 11, 1981, at paragraph 5:

... a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

This does not mean that a party is precluded from ever raising the issue before the Board; but it *does* mean that the Board will not fail to take into account the perception of the parties themselves over a number of years and the consequent treatment of an individual as managerial or otherwise, and this factor may be granted certain weight in the Board's forming of its own conclusion, in the absence of compelling evidence to the contrary. This recognition of longstanding practice promotes at least some measure of peace and stability between the parties over an issue long thought to have been put to rest between them. And it is a benefit accruing to *both* sides of the case: the respondent would, as a practical matter, have to contend with the same kind of common-sense onus were it to attempt to suddenly reverse itself on its long-accepted position on the status of department heads, who have always been *included* in the unit. Stability on an issue of status ought clearly to depend on more than the preferences of particular incumbents in the job from time to time.

4. In the present case, the Board is not satisfied that the historical perception of the parties has been in error. The assistant store manager is not, as the applicant has argued, simply called upon to perform at the same level of responsibility as the department heads. On the contrary, the Board finds the transcript supportive of a material distinction in authority and responsibility between the assistant store manager and the various department heads in a store. Quite apart from the issue raised by the respondent, of the colourability of the evidence of the principal witness, the assistant store manager Mr. Majbroda, the Board finds that the evidence of the two store managers, one of whom was able to recount specific instances of exercising authority from his days as an assistant store manager, together with the evidence of both assistant managers, provide a more full and fair account of the expectations of the job. The evidence satisfies us that assistant store managers, unlike the department heads, have the authority to issue all levels of *formal* discipline, excluding discharge, and have, when circumstances required, done so. The assistant at the second store, for example, has had occasion to sit down in the office with an employee and his steward to issue formal discipline. That the assistant managers spend the bulk of their time helping out on the floor where they feel they are needed (the manager and assistant manager of one store agreed on an estimate of six out of eight hours) is not surprising in an operation of this small size. It is clear, however, that the assistant store managers do get involved in resolving problems between departments, or in transferring employees between departments, with or without the Store Manager, in a way that department heads do not. It is clear, even from the evidence of Mr. Majbroda, that the assistant store managers give directions to department heads, but not vice versa. The assistant store managers are also looked to by the employer as the primary source of relief for the times that the Store Manager himself is absent on days off, vacation or for other reasons. While certain personnel, including department heads, are put "in charge" of some of the night shifts as well, the Board finds a qualitative difference in the supervisory responsibility expected from them as opposed to the assistant store managers. There are, for example, payroll, sales and cash, overtime and store expense reports to be signed each week, and the company makes sure that they always have either the Store Manager or his assistant in the store to do so. All of these elements, in the Board's view, distinguish this case from *Super-City Discount Foods Ltd.*, [1965] OLRB Rep. Dec. 582 and *Dominion Stores*, [1975] OLRB Rep. Aug. 444, cited by the applicant. Having regard to the aforesaid elements, together with the incidental functions, such as scheduling the grocery department and the hiring of part-time employees,

performed by the assistant store managers, the Board finds that they are not “employees” within the meaning of the Act.

5. The application is accordingly dismissed.
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1616-83-R Graphic Communications International Union, Local 28-B, Applicant, v. Don Mills Bindery Inc., Respondent, v. Thorn Press Limited, Intervener

Related Employer – Sale of a Business – Board not proceeding under sale provision as transaction not finalized – Employer sub-contracting part of its operation to newly created entity – Retaining effective economic control over activity of new entity – Requirements for related employer declaration met

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members G. Donnelly and W. F. Rutherford.

APPEARANCES: Norman L. Jesin and Ken Magnus for the applicant; Philip A. Fellen and Carmelo Civello for the respondent; J. Paul Wearing and Tom Rogers for the intervener.

DECISION OF THE BOARD; December 12, 1983

1. The name of the respondent is hereby amended to read “Don Mills Bindery Inc.”.
2. This is an application filed under section 1(4) of the *Labour Relations Act* and in the alternative under section 63 of the Act. Section 1(4) of the Act reads:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Section 63 of the Act reads in part:

- (1) In this section,
 - (a) “business” includes a part or parts thereof;
 - (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

3. The material facts which were put in evidence before the Board are set out as follows:

- Thorn Press Limited, operating from 135 Railside Road, offers a full range of printing and related services, some of which it supplies itself and some of which it contracts to have performed.
- Prior to 1983 the company operated a bindery department which performed saddle stitch and spiral bindery. Twenty-three bargaining unit employees were employed in the bindery department under the supervision of Mr. Carmello Civello, the bindery department foreman.
- Thorn Press made a decision in 1983 to discontinue its bindery department and to contract for the work that had been performed in that department.
- Mr. M. Civello, the bindery department foreman, who, along with all of the other employees in the bindery department, received notice of layoff, approached the President of Thorn Press with the suggestion that he rent the space taken up by the bindery department at 135 Railside and operate a bindery business.
- It was agreed that a trial arrangement would be entered into under which Mr. Civello would pay \$3,400 per month for the 9,000 square feet of space taken up by the bindery department and would have the use of Thorn's equipment without charge. The lease is a verbal month to month one. The value of the bindery equipment which Mr. Civello was given use of is approximately \$250,000. Mr. Civello was required to purchase the stock and supplies but there is no evidence as to their value.
- Mr. Civello incorporated a company, Don Mills Bindery Inc., to carry on a bindery business from 135 Railside Road. Don Mills Bindery Inc. hired ten of the employees who had formerly worked for Thorn in the bindery department. These employees are paid by Don Mills Bindery Inc. and work at the same location and with the same equipment as they had when employed by Thorn Press.

- Don Mills Bindery Inc. commenced operation at 135 Railside in October, 1983 and thus far in excess of 90% of its business has been with Thorn Press. Approximately 80% of the bindery work which Thorn has contracted for since Don Mills Bindery Inc. commenced business has been with that company. Formerly Thorn processed about 90% of this work through its bindery department. Don Mills Bindery Inc. has performed this work for Thorn Press at competitive prices exclusive of any service charge or rental charge for the Thorn equipment which it is using. It is estimated that the charge for the equipment approximates 5% of the cost of any job. Don Mills Bindery Inc. has also performed work for customers other than Thorn.
- Thorn Press has no financial interest in Don Mills Bindery and none of the officers or officials of Thorn Press hold shares in or occupy management positions in Don Mills Bindery Inc. Similarly, Mr. Civello, the sole shareholder and director of Don Mills Bindery Inc., has no financial interest in Thorn Press and does not hold any management position in Thorn Press.
- Mr. Civello intends to lease the bindery equipment owned by Thorn Press if, in his own words, he finds there is money in the bindery business. He acknowledged that if Thorn Press wants the equipment back he is “out the door”.

4. In this case a business entity was created to operate a bindery business from the same location and using the same equipment as the bindery part of Thorn's business. The new business entity was created by the person who supervised the bindery part of Thorn's business and those employed to work for the new business entity have formerly worked in the bindery part of Thorn's business. In excess of 90% of the work performed by the new business entity emanates from Thorn Press. In the result, the persons who had formerly worked in the bindery part of Thorn's business and who now work for Don Mills Bindery Inc. find themselves working in the same location, on the same equipment and doing essentially the same work with the only difference being that they are no longer covered by the terms of the collective agreement between Thorn and the complainant trade union. Given the expansive nature of the statutory definition of “sells” and its application to a “part of a business” we are satisfied that a finding of a sale of a part of a business, from Thorn to Don Mills Bindery could be made in this case.

5. However, the evidence is that the transaction between Thorn Press and Don Mills Bindery has not been finalized and, as the matter now stands, we are also satisfied that Thorn retains effective control over the bindery business that is being carried on by Don Mills Bindery Inc. In these circumstances, it is our view that it is more appropriate to proceed under section 1(4).

6. A useful summary of the purpose and scope of section 1(4) of the Act is found in *The Charming Hostess*, [1982] OLRB Rep. April 536 at paras 40, 41 and 42 as follows:

40. In the instant case, section 1(4) was pleaded in the alternative, for, to some extent, section 63 and 1(4) are complementary. Both sections are

designed to preserve the collective bargaining status quo despite commercial transactions which alter the legal identity of the employing entity, and would consequently undermine established bargaining rights. In *Brant Erecting and Hoisting Limited* [1980] OLRB Rep. July 945, the Board made the following comments about the origin and purpose of section 1(4):

“Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55”.

41. Because of the amendment to section 1(4) in 1975, it is not necessary that there be shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the related employer is a functional rather than a temporal one. (For a discussion of the reasons for amendment see: *Brant Erecting, supra*, at paragraphs 13 – 14.) Section 1(4) creates a regime of collective bargaining law which (like section 63), significantly modifies common law notions of “privacy of contract” or “the corporate veil”. But while the language of section

1(4) is very broad, the section is not intended to be applied in every case which, in a general sense, meets its statutory criteria. The Board had a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully in light of the circumstances of particular cases, and labour relations policy considerations.

42. Section 1(4) does impose some limits on the degree to which an employer can avoid its obligations under a collective agreement by substituting the employees of another employer for its own – even though the arrangement may not have been undertaken for the purpose of subverting bargaining rights (in which case unfair labour practice considerations might also arise). This is especially the case where the functions performed by the employees of the other employer are carried out on the first employer's premises, with the first employer's equipment, in conjunction with the work performed by the first employer's own employees, and subject to the first employer's overall direction and control. In *The Great Atlantic and Pacific Company of Canada Limited* [1981] OLRB Rep. March 285, for example, legislation required "A & P" to create a new corporate vehicle to run the pharmacy department which it had established in its larger food stores. There was no anti-union motive, but the separate legal identity of the "drug company" was totally artificial from a collective bargaining point of view. And the Board issued a related employer declaration. The drug company was completely dominated by A & P, and had no business activities apart from it. The fact that the drug company hired employees, paid them and directed them in their daily activities did not obscure the reality of the situation.

7. The *J. H. Normick Inc.* case [1979] OLRB Rep. Dec. 1176 provides an example of functional control within the meaning of section 1(4) of the Act which is particularly relevant to the case at hand. In the *J. H. Normick* case a large corporation (Normick) holding extensive timber cutting rights and operating a number of sawmills and plywood mills, entered into a labour subcontract with an individual under which the individual would in turn subcontract the cutting of timber to a number of brokers who had formerly worked directly for Normick. Under the terms of the arrangement the corporation retained its authority to allow the cutting, established its authority to verify the cut and maintained the power to terminate the labour subcontract on short notice. The Board began its analysis in that case by observing:

The section extends to cover not only related businesses but related activities as well. The Board, therefore, is not restricted to considering corporate interrelationships but must also look to functional interdependence in determining if two or more entities are related within the meaning of the section. The second pre-condition to the issuance of a declaration is that the Board find that the related entities are "under common control or direction". In so far as "direction" refers to the impact of personal or corporate authority, the Board must also look to whatever contractual arrangements exist and to the economic reality in deciding if the related activities or businesses are under common "control".

The Board found that the business activities of Normick and the cutting that was to be carried out by the individual were functionally related and that the corporation maintained “de facto” operational and economic control over the cutting activity. In deciding to exercise its discretion to make a declaration under the section the Board commented that:

Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make “industrial relations sense” to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes.

(See also *Donald A. Foly Limited*, [1980] OLRB Rep. April 1936.)

8. We are driven to the same conclusion in this case as was the Board in *J. H. Normick Inc.*, *supra*. In this case, as in *J. H. Normick Inc. supra*, a sizeable and well established company offering a full range of printing-related services has decided to subcontract a part of its operation. In the face of the previous integration of the bindery department within the Thorn organization and in the face of Thorn now using Don Mills Bindery Inc. to perform in excess of 80% of the bindery work that it requires, we must conclude that the activities carried on by Thorn and the bindery activities of Don Mills are related activities within the meaning of section 1(4). Furthermore, as in *J. H. Normick, supra*, the terms of the arrangement between the two entities as they now exist are such that Thorn enjoys effective control over Don Mills. Thorn owns both the premises from which Don Mills operates and the equipment that it uses to produce and provides Don Mills with in excess of 90% of its work. Don Mills occupies 9,000 square feet of space owned by Thorn at its Railside Road location on the basis of a verbal month-to-month lease. Don Mills operates Thorn’s equipment at the pleasure of Thorn. There is no lease or other document which gives Don Mills any legal claim to this equipment such that Mr. Civello testified that if Thorn wants its equipment back, “I am out the door.” In these circumstances, we can come to no other conclusion but that Thorn enjoys effective economic control over the bindery activity carried on by Don Mills Bindery Inc.

9. In this case, where Thorn enjoys control over the related activities of Don Mills Bindery Inc. and itself and where the employees who had previously performed its bindery work perform the same work on the same equipment at the same location for Don Mills, it makes eminently good labour relations sense to cut through the arrangement that has been made and to exercise our discretion under section 1(4) of the Act to declare that Thorn Press Limited and Don Mills Bindery Inc. constitute one employer for the purposes of the *Labour Relations Act*. Having regard to all of the foregoing, we hereby so declare. We declare further

that the respondent, Don Mills Bindery Inc., is bound by the collective agreement entered into between the applicant and Thorn Press Limited.

0500-83-U N. Ghermeck, M. Cochrane, et al, Complainants, v. Teamsters Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent, v. **Dufferin Concrete Products** – Toronto Division, Intervener #1, v. Teamsters Union, Joint Council No. 52, Intervener #2, v. Group of Teamsters Local Union 879 Employees, Intervener #3

Duty of Fair Representation – Unfair Labour Practice – Employees of closed operation represented by Local 879 transferred to Local 230's unit – Dispute between two locals as to status of transferred employees seniority – Local 230's objection to dovetailing overruled by Joint Council and International Union – Whether reluctant acceptance of International's ruling amounting to unfair representation – Whether interpretation of internal union documents arbitrary

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and P. J. O'Keeffe.

APPEARANCES: *R. W. Kuszelewski, K. W. V. Whitaker and A. Gargarella for the complainants; Harold F. Caley and Bruno Teichmann for the respondent; G. Grossman, S. Corradetti and D. Smith for intervener #1; Norman L. Jesin and Charles Thibault for intervener #2; C. Hillmer and Allan Christie for intervener #3.*

DECISION OF THE BOARD; December 19, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the complainants have been dealt with by their trade union contrary to the provisions of section 68 of the Act. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The complainants are essentially the drivers employed by Dufferin Concrete Products (hereinafter "Dufferin") in its Toronto operations. Local 230, the respondent, is the Teamster Local with jurisdiction for the Toronto area, and has at all material times had a collective agreement with Dufferin covering the complainants. In 1976, Dufferin purchased the ailing yard of a company called KBM in Oakville, and continued to operate it on a reduced basis. Oakville is considered part of the Hamilton area for Teamster jurisdiction. KBM, therefore, had had its collective agreement for Oakville with the Hamilton Local, 879, and Dufferin

continued to do likewise after the purchase. There were by 1982 approximately 20 drivers on the former KBM seniority list, averaging 25 years' service with the company.

3. Dufferin had, to that point, been treating Oakville and the "Toronto area" separately, the latter being serviced by a single dispatch system from yards in Erindale, Rexdale, and Pickering. Early in 1982, however, the company announced its plans to close the Oakville yard permanently, and to treat Oakville and Toronto as a single "market" area. There was a history of drivers from one jurisdiction having to cross the Oakville/Toronto line from time to time, often with grievances from the other Local, and the company wished to eliminate this problem by combining all drivers into an integrated seniority list, and using a single dispatch system for all of what it viewed as the "Toronto" area.

4. Local 230 and its members, however, strongly opposed such a move, and a confrontation developed between the Toronto and Hamilton Locals. When it became apparent that no consensus was about to be reached at the level of the Locals, Local 879 requested a meeting of the umbrella group for the area, Teamsters Joint Council No. 52. The meeting was convened on February 24, 1982, and was attended by the Executive Board of the Joint Council, the Executive of Locals 230 and 879, and stewards and other drivers from each Local. In the course of the discussion, Bruno Teichmann, President of Local 230, indicated he had been told by Dufferin that they were working on continuing the lease for the Oakville yard. Charles Thibault, the President of the Joint Council, asked, "Why are we here then", and the meeting adjourned.

5. It soon became apparent, however, that the company's plans to close Oakville would be proceeded with, and a second meeting of the Joint Council was set up for April 22, 1982, at the request of Local 879. Essentially the same people were in attendance as at the first meeting. One of the complainants, Mr. Gargarella, attended this meeting as a Local 230 steward, and testified that Mr. Teichmann took the position that he had a contract with the men of Local 230 (i.e., the collective agreement), and could not agree to any "dovetailing" of seniority. Mr. Contardi, the President of Local 879, argued the contrary position, and the Joint Council Executive withdrew to consider the matter. When it returned, it said it would need to consider the matter further, and would advise of its decision. There was, we might note, a suggestion made by Mr. Kuszelewski in argument that Mr. Contardi himself attended and participated in the deliberations of the Joint Council. Whatever the Board might have said about that, we note that this is the first time such an allegation has been raised on behalf of the complainants, and we are satisfied that Mr. Kuszelewski's suggestion in argument stems from a misreading of the testimony given by Albert Gargarella. The Board accordingly finds no basis for considering that allegation further.

6. On May 3, 1982, the Joint Council came down with a decision in favour of dovetailing. Its decision read:

Dear Sir and Brother:

Seniority Dispute between Locals 879 & 230 as it applies to K. B. M. Concrete, a Division of Dufferin Concrete Products.

After considering all of the evidence and positions submitted by the Locals at the Hearings conducted on February 24th and April 22nd, 1982,

it is the unanimous decision of Joint Council No. 52 Executive Board that the seniority lists of KBM and DCP be dovetailed. For the purpose of this decision "dovetailing" means"

"recognizing individuals starting date with both Companies and weaving them together chronologically forming one seniority list".

The formula for dovetailing to be as follows:

- (1) The establishment of an active seniority list dovetailing all present employees actively working.
- (2) The establishment of an inactive seniority list dovetailing all inactive or laid off employees.
- (3) Recall shall be by seniority; once recalled the employee's seniority shall be dovetailed on the active seniority list in accordance with his original starting date.

This decision is effective upon receipt of this letter, and the Locals should notify the Company of this decision forthwith.

If either Local have any questions concerning the interpretation of this decision you are invited to attend the next Joint Council Executive Board meeting at 2.30 p.m. on May 26th, 1982.

Please contact the writer if you plan to be in attendance.

Fraternally yours,

"Charles Thibault"

Charles Thibault,
President.

Mr. Gargarella and other Local 230 members angrily attended at Mr. Teichmann's office to question the decision, and Mr. Teichmann is said to have responded that that was the law of the land, and there was nothing he could do about it. Whether or not that was Mr. Teichmann's response at that point (and we find it more likely that Mr. Gargarella was confusing this occasion with Mr. Teichmann's remarks a year later), Mr. Teichmann did not accept the Joint Council's decision as final. The company apparently had begun to implement dovetailing at that point, and Mr. Teichmann insisted on a meeting with management and Local 879. At the meeting Mr. Teichmann let everyone know that his men were extremely unhappy over dovetailing, and that grievances would be filed. The next day the union did in fact collect grievances from all of 230's men and filed them with the company. A group of Local 230 members, headed by a Mr. Latto, also retained a lawyer, Mr. Rinaldo, and lodged a section 89 complaint with the Labour Board against the company and the Joint Council. In the face of all of this, the company on June 25, 1982, issued a statement through counsel that it was pulling back its decision to dovetail.

7. Meanwhile, Mr. Teichmann had on June 14th filed an appeal to the International of the Joint Council's decision. In that appeal, he challenged both the decision of the Joint Council on the issue of dovetailing itself, and the authority of the Joint Council to make that decision. The letter of appeal read:

June 14, 1982

Dear Sir & Brother:

We are enclosing copies of Collective Agreements between Teamsters Local Union No. 230 and Dufferin Concrete Products and a copy of the Letter of Understanding between Dufferin Concrete Products - Toronto Division and Teamsters Local Union 230 and Teamsters Union 879. We are also enclosing a copy of a recent "decision" of Joint Council No. 52. This matter involved the dovetailing of seniority lists with respect to members of Local 230 and Local 879 who worked for an employer in separate locations under separate Collective Agreements.

At the hearings before the Joint Council we challenged the jurisdiction of the Joint Council to deal with and consider this matter.

As a result of the Joint Council decision we are faced with the following:

- (a) grievances by the employees affected (copies enclosed);
- (b) complaints to the Ontario Labour Relations Board under Section 89 of the Act (copies enclosed).

We are also concerned about the possibility of a termination application.

By this letter we are requesting that you declare null and void the "decision" of the Joint Council referred to above, as there is no authority in the constitution for the Joint Council to make the "decision" it made. In order that you might be aware of all of the facts we are requesting a meeting with respect to this matter.

With best wishes,

Fraternally yours,

"B. A. Teichmann"

Bruno A. Teichmann
President

Mr. Teichmann further discussed the problem at the Canadian conference of Teamsters in Calgary, and was advised to get the matter to arbitration as quickly as possible. This was done by Mr. Teichmann, and a hearing date of September 20th was arranged.

8. At the hearing before the arbitrator, however, a group of 879 men appeared with counsel, and took the position that the matter ought to be dealt with by the Labour Board, via the section 68 complaint which they had apparently just filed against local 230. The theory of that complaint was that since the 879 men had been briefly transferred into the 230 bargaining unit in May of 1982, Local 230 now owed a duty of fair representation to them as well. As a result, all counsel (including Mr. Rinaldo for the present complainants) agreed to use the day to attempt to work out a mutually-acceptable resolution to the matter, rather than attempt to proceed at that point before the arbitrator. Based on the discussion which took place, counsel for the company undertook to produce a draft agreement and circulate it to the other counsel for consideration by their principals. Counsel did that on September 21st. The proposed compromise would have granted the men from Local 879 a seniority date on Local 230's seniority list of January 1, 1977. The existing Local 230 members, however, through their own solicitor, Mr. Rinaldo, rejected that compromise on October 12th.

9. A new arbitration date was then set up by Mr. Teichmann, being January 10, 1983. On November 23, 1982, a meeting was held for all of the affected drivers of Local 230, in order to further discuss the options available. Mr. Teichmann had Local 230's counsel there, Mr. Caley, and Mr. Renaldo was invited to attend as well to assist the members. Mr. Gargarella testified that Mr. Teichmann was pushing the January 1977 compromise. Mr. Teichmann's evidence, which we accept as more precise, is that he urged the members to adopt *some* form of resolution before the International had an opportunity to issue a decision on his appeal. Based on his knowledge of how similar situations had been dealt with in the past, and the importance that the International placed on seniority "as a Teamster", Mr. Teichmann anticipated that the International would not be sympathetic to Local 230's appeal. Mr. Teichmann accordingly felt it was in his men's best interest to try to pre-empt a ruling by the International, and urged that the grievances be processed to arbitration without delay. Mr. Gargarella acknowledged in his evidence, however, that the men were not in favour of *any* action being taken at that point, because, with the dovetailing having been withdrawn, they were pleased with the way matters stood.

10. It turned out not to be Local 230's choice, however. The Local 879 group, through their own solicitor, brought the matter on before the Labour Board in December. Counsel for Local 230 argued that the matter ought to be allowed to proceed to the scheduled arbitration, and that the Board ought to decline to entertain the section 89 complaints. The Board preferred the arguments of the 879 members, however, and on December 21, 1982, ruled that it would deal with the unfair labour practice complaint. The Board subsequently granted an adjournment, to permit all interests or complaints to be consolidated in a single proceeding. Bound by this decision of the Board, Local 230 cancelled the arbitration hearing set for January 10th, and prepared to deal with the matter before the Board. Mr. Gargarella acknowledged in his testimony that the complainants (the 230 men) had no quarrel with the efforts of Local 230 to represent them to this point.

11. Then on January 31, 1983, the International issued its decision, denying Local 230's appeal. The decision rejected Mr. Teichmann's argument that the Joint Council had no jurisdiction under the constitution, and further ruled that no appeal lay to the International in a collective bargaining matter of this kind. The decision read in full as follows:

Dear Sirs and Brothers:

This will advise that the General Executive Board, at its meeting held January 27, 1983, voted to dismiss the appeal of Local Union 230, in its entirety, with respect to dovetailing of seniority lists at Dufferin Concrete Products. Based upon the submissions of the parties, and the decision of the Joint Council, it is clear that this is not a jurisdictional dispute. This dispute over seniority concerns a collective bargaining matter within the meaning of Article XIX, Section 12(c) of the International Constitution. As such, there shall be no appeal from the decisions of the Joint Council. Hence, Local Union 230 must comply with the May 3, 1982, decision of Joint Council 52.

For your information, a report of the General Executive Board's findings is enclosed.

Fraternally yours,

“Ray Schoessling”

Ray Schoessling
General Secretary-Treasurer

The attached findings read:

Appeal of Local Union 230 From a Decision of Joint Council 52 Involving a Dispute Between Local Union 230 and Local Union 879

This case comes before the General Executive Board pursuant to an appeal filed by Local 230 from a decision of Joint Council 52, which had resolved a dispute between Local 230 and Local 879 by ordering the dovetailing of seniority lists at Dufferin Concrete Products.

On February 24 and April 22, 1982, the Executive Board of Joint Council 52 conducted hearings to resolve the seniority dispute between Locals 230 and 879 as it applied to K.B.M. Concrete, a division of Dufferin Concrete Products. After considering all of the evidence and positions submitted by the Locals at the hearings, the Executive Board of Joint Council 52 unanimously decided that the seniority lists of K.B.M. Concrete and Dufferin Concrete Products should be dovetailed. The Joint Council decision, dated May 3, 1982, set forth in specific detail a formula for dovetailing the seniority lists. The decision of the Joint Council also specifically directed that the decision would be effective upon receipt.

By letter dated June 14, 1982, Local 230 appealed the decision of Joint Council 52 to the General Executive Board. Brother Bruno A. Teichmann, President of Local 230, argued that Joint Council 52 had no authority or jurisdiction over this dispute and that the General Executive Board should rule the Joint Council decision to be null and void.

Although it has been suggested that this dispute is a jurisdictional dispute covered by Article XII, Section 12 of the International Constitution, judging from the submissions of the parties and the decision of the Joint Council, it is clear that this is not a jurisdictional dispute. With regard to the contention that the Joint Council had no authority to resolve this matter, the following portion of Article XIX, Section 12(c) of the International Constitution clearly covers this situation:

The appeals procedure provided herein is also available to and must be followed by any member, or former member who is aggrieved by any decision, ruling, opinion, or action of the Local Union membership, officers, or Executive Board, including collective bargaining matters. In the case of collective bargaining matters, there shall be no appeal from decisions of the Joint Council.

This dispute over seniority is clearly encompassed within the phrase "collective bargaining matters", as set forth in the above-quoted provision of the International Constitution. As such, the Constitution clearly specifies that "in the case of collective bargaining matters, there shall be no appeal from decisions of the Joint Council".

Accordingly, the General Executive Board dismisses this appeal in its entirety and directs Local 230 to comply with the May 3, 1982, decision of Joint Council 52.

12. In light of this decision, Mr. Teichmann consulted with counsel as to the options left open to him. He considered the possibility of:

- (1) complying with the decision of the International, as the final authority in the organization;
- (2) launching Court action against the International and/or the Joint Council; or
- (3) simply ignoring the decisions.

Mr. Teichmann concluded from the opinion he received from counsel that he could not be successful in a suit against the International or the Joint Council. As an officer of the Local Union, he also decided that he could not simply disregard the decisions of the governing authorities under his constitution and by-laws. He therefore concluded that Local 230 had no further alternative but to accept the ruling of the organization, and to formally request the company to implement it. This he did by letter dated February 18, 1983, a copy of which was sent to each member, along with a copy of the Joint Council and International's decisions.

At the request of Mr. Teichmann, a further meeting was arranged with all counsel, including counsel for the group of Local 230 drivers, in a final attempt to work out a compromise. No such compromise was forthcoming, however, and the company once again proceeded with the implementation of a single “dovetailed” seniority system. The Local 230 members drafted grievances and submitted them to Mr. Teichmann, but Mr. Teichmann, after consultation with Local 230’s lawyer, refused to file them with the company. It was the opinion of Local 230’s lawyer that, having advised the company of the International’s decision and instructed it to proceed with the dovetailing, Local 230 would be estopped from proceeding successfully with a grievance which challenged the company for dovetailing.

13. Counsel for Local 230 clearly was correct that it was, at that point, too late to grieve. And Mr. Gargarella in his evidence conceded that the complainants were satisfied with the respondent’s efforts up to the point where the International issued its decision. The critical question, therefore, is whether Local 230 failed in its duty of fair representation in concluding as it did to accept the decision of the International, and instructing the company to implement the ruling which the Joint Council had previously made.

14. In support of his argument that the duty has been breached, counsel for the complainants cited a number of authorities which the Board has now reviewed. In particular, counsel points to the decision of the Board in *Stephen Gormley*, [1978] OLRB Rep. Feb. 143, wherein the Board noted at paragraph 18:

... The Board has repeatedly held that in order not to act in an arbitrary manner in the processing of a grievance, the union must direct its mind to the merits of the grievance and act on the available evidence. While the effective operation of the grievance machinery requires that unions also be allowed to consider factors beyond the merits of a particular grievance in deciding whether to process a grievance on to arbitration, considerations of this nature must have their roots in the welfare of the bargaining unit and the bargaining process and must not be based on irrelevant facts or principles.

Here counsel argues that the Local 230 drivers had a clear protection in Article 28.01 of their collective agreement against dovetailing, and that the majority interest of the bargaining unit required Local 230 to submit the matter to arbitration if the company’s view of the matter was to dovetail. He maintains that the decisions and directions of the Joint Council to do otherwise were “irrelevant facts” for Mr. Teichmann to be influenced by, because no authority existed under the respondent’s constitution or by-laws to permit the Joint Council or International to usurp the power of the Local Union, as bargaining agent, to exercise its own discretion with respect to what everyone has agreed was, in the language of the constitution, a “collective bargaining” matter. Counsel argues that, where the rights of the employees and the obligation of the Local trade union are clear, the Local union is not entitled to take into account matters of internal trade union “administration” (i.e., the maintenance of order within the International), unless there is clear evidence that a refusal to abide by a particular decision of the International would lead to the total collapse of the organization.

15. In assessing the complainants’ argument, a number of observations should be made

at the outset. While our ultimate decision would likely not turn on it, we do not accept counsel's submission that protection of the complainants (against dovetailing) was "expressly" provided by Article 28.01 of the Local 230 agreement. That Article went into the collective agreement for the first time in the 1982 round of negotiations, after the present controversy had raised the issue, and read:

ARTICLE XXVIII – MERGERS

28.01 Where the Employer acquires by way of purchase or any other manner of disposition the business or undertaking of Canada Building Materials Company, Custom Concrete Limited, Dufferin Concrete Products – Toronto Division, Kilmer Van Nostrand Co. Limited, McCord & Company (Division of Standard Industries Ltd.), Premier Concrete Products (Division of Lake Ontario Cement Limited), Richvale Block and Ready Mix, Division of Canfarge Ltd. – Thornhill and Teskey Concrete Co. Ltd. within the geographic area of this Agreement, and the operations of the Employer and such other company are merged, and the employees are intermingled, and further providing that such other company has a provision identical in form with this provision, the seniority lists of the Employer and such other company with respect to members of the Union shall be dovetailed. If the Employer does not require all of the employees after the merger, lay-off shall commence from the bottom of the dovetailed seniority list.

For the purpose of clarity it is agreed that this provision shall have no application to or effect on the intended closure of the Oakville plant of Dufferin Concrete Products.

It could be credibly argued, on the one hand, that recognition of the need for such a clause in order to accomplish dovetailing indicates the lack of any opportunity for dovetailing otherwise. On the other hand, it could also be credibly argued that the collective agreement language prior to this amendment simply left a vacuum on the issue of dovetailing, and that the parties, having been sensitized to the potential problem by the present controversy, undertook to write an appropriate code of compromise to govern any future situation. The Article itself is expressly stated to have "no application to or effect on the intended closure" of the Dufferin Oakville plant, which arguably was tantamount to saying that the insertion of new language into the collective agreement was "without prejudice" to the situation already in litigation amongst the parties.

16. In addition, counsel for the complainants made reference to the respondent acting contrary to the interests and the will of the "majority" of the bargaining unit. It is worth noting, in that regard, that the "duty of fair representation" evolved historically out of a concern to protect the interests of the *minority*, within a regime of legislated bargaining rights. See *Vaca v. Sipes*, (1967) 386 U.S. 371; *Ford Motor Company of Canada Limited*, [1973] OLRB Rep. Oct. 519, at paragraphs 37 ff.; *Dufferin Aggregates*, [1983] OLRB Rep. Jan. 35, at paragraph 34; Cox, *Rights Under A Labour Agreement* (1956) 69 Harv. Law Rev. 601. To the extent that the duty of fair representation has come to be extended in appropriate cases to the union's treatment of the majority of the bargaining unit, or of the unit as a whole, that class of case must be analysed in a different way from cases like *Dufferin Aggregates*, *supra*,

upon which the complainants have relied. In that case the conflict arose between disparate interest groups *within* the bargaining unit, and a potential for the so-called “tyranny of the majority” is readily apparent. In this case, however, no conflict whatever existed within the bargaining unit that Local 230 represented. The conflict was between the Local 230 bargaining unit as a group, and the laid-off members of the bargaining unit for which Local 879 had held bargaining rights. Local 230, in other words, had *no* conflict within the group it felt it had to represent. Local 230 clearly recognized that, and single-mindedly pursued the interests and the wishes of that group, at least to the point where its appeals to the International had been exhausted. Its final decision to comply with the direction of the International was not based on any “balancing of interests” within the unit, but rather a reluctant acceptance of the constitutional authority of the International.

17. The acceptance by the Local of that overriding authority, however, raises issues which cannot be dismissed lightly. The present case involved a classic conflict of interest between two Locals of the same International Union, and it is difficult at first glance to find fault with the parent organization, through the Joint Council of local unions established under its Constitution, for accepting the responsibility for determining and resolving this difficult issue. This is consistent, in fact, with precisely the kind of response by the Teamster organization as a whole which the Board observed critically was *lacking* in the *Softley Cartage* case, [1982] OLRB Rep. May 766, cited by the complainants. But one can readily visualize the issue arising in a very different context, where heavy-handedness or interference by an International in the execution by a Local Union of its statutory mandate as bargaining agent might well appear less constructive. (For a case at least touching on the ramifications of this issue, consider the decision of the Board in the *International Association of Bridge, Structural and Ornamental Ironworkers Union*, [1978] OLRB Rep. October 1487.) In assessing the proper application of the duty of fair representation to cases of this kind, it appears to us that the extent to which members of a locally-represented bargaining unit can be expected to be made subject to the direction of a higher authority within the union cannot be determined without regard to the purported basis for such authority. There is, in other words, a contractual element involved in the overall administration of a trade union (cf. *Astgen v. Smith*, (1970) 7 D.L.R. (3d) 657 (Ont. C.A.), which, while not strictly determinative of the “duty of fair representation”, is clearly not irrelevant to it.

18. That is not to say that the Board will interpret the governing documents of the trade union itself with the object of determining whether the interpretation ultimately acted upon is the correct one. There may be a contractual issue between the parties in a case like this, but that is not the issue which arises under section 68. The only standard required to be met under section 68 is to satisfy the Board that the trade union has not acted in a manner that is “arbitrary, discriminatory, or in bad faith.” In applying the section 68 standard of review to a trade union acting, e.g., pursuant to its interpretation of a collective agreement, the Board has not required the union to satisfy the Board that its interpretation was the correct one. That would, as the Board has noted, amount to substituting the Board’s opinion for that of the designated bargaining agent. Rather, the Board looks to the actual merits of the matter at issue only as a step in the process of satisfying itself that the trade union has in fact “turned its mind” to the problem in an honest and real way, as opposed to acting in a manner that appears arbitrary or in bad faith. We find no basis for a higher standard being imposed on a Local Union under section 68 with respect to its own internal documents. We recognize as well that a bargaining agent in the position of a *Local* Union, as argued here, may have to weigh in its mind the possibility of a lawful trusteeship being imposed by its parent, and the

effect that that might have on the furtherance of its members' interests. But either the Local or, in the event of such a trusteeship, the International, remains subject to the "duty of fair representation" to the members, no less with respect to the purported basis on which a decision affecting the members is made by someone other than the designated bargaining agent, as it does with respect to the quality of decision-making itself. To that extent, the reasonableness or supportability of the disputed interpretation of the constitution may, as in the case of collective agreements, provide relevant evidence of the breach or non-breach of the statutory standard.

19. Here the respondent Local 230 itself challenged the authority of the Joint Council to render the decision that it did. Local 230 abandoned that position only after the International Executive Board had considered the issue and given written reasons for its interpretation. Those reasons found the general authority of the Joint Council to be implicit in the following words of Article XIX, section 12(c):

In the case of collective bargaining matters, there shall be no appeal from decisions of the Joint Council.

The specific jurisdiction of the Joint Council over "collective bargaining matters" is not anywhere in the governing documents defined, but the fact that such a plenary jurisdiction exists within this organization is a reasonable inference from the language referred to. Nor in reviewing the constitution of the International, the By-laws of Local 230, and the By-laws of Joint Council No. 52, can the Board find anything inconsistent with that broad interpretation given to section 12(c) by the International. And Article XV, section 6 provides:

All Local Unions within the jurisdiction of the Joint Council shall affiliate with the Joint Council, comply with its laws and obey its orders.

It is true, as the complainants point out, that Article VI, section 3, of the Constitution provides:

In any controversy with an employer not covered by a Local Union agreement, the Local Union shall make all reasonable efforts to settle the same through negotiation and, if it fails, through a fair arbitration tribunal.

and that Article 20(E)(2) of the Local's By-laws provides:

Every member, by virtue of his membership in the Local Union, authorizes his Local Union to act as his exclusive bargaining representative with full and exclusive power to execute agreements with his employer governing terms and conditions of employment and to act for him and have final authority in presenting, processing and adjusting any grievance, difficulty or dispute arising under any collective bargaining agreement or out of his employment with such employer in such manner as the Local Union or its officers deem to be in the best interest of the Local Union ...

but the remaining language of both of those Articles convey the clear intent that these stipulations exist subject to the overriding authority of the International and its constitution. The Board can, therefore, find nothing in the ultimate acceptance by the respondent of the purported authority of the Joint Council which on its face could be described as arbitrary, discriminatory, or in bad faith. What of the Joint Council's decision itself?

20. Courts in the United States have on numerous occasions been called upon to consider mergers and the integration of seniority lists in the context of the "duty of fair representation". Foremost in the Court's consideration of the problem has been the recognition that there is no clearly "right" or "wrong" answer: whether the decision be for "end-tailing" or "dove-tailing", there will always be a group of employees within the union (as the present case demonstrates) adversely affected by and unhappy with it. The courts, accordingly, have shown a great reluctance to attempt to "second guess" the decision of the union, so long as the decision which the union itself has arrived at appears to be a rational one. See *Post-Vaca Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, Mathews, (1974) 19 Villanova L.R. 885; *Fair Representation, the NLRB, and the Courts*, Boyce (1978) University of Pennsylvania, Industrial Research Unit. In the leading case, *Humphrey v. Moore*, (1964) 375 U.S. 335, a decision to dovetail seniority lists was arrived at unanimously by a joint appeal body (the Joint Conference Committee), made up equally of union and employer representatives, and established to deal with grievances under the Teamster Union's collective agreement. The decision was challenged in the Courts by the adversely-affected members of the bargaining unit (the acquiring company's employees) on the grounds that; (1) the union had breached its duty to represent the buyer's employees fairly; and (2) the Joint Conference Committee had exceeded its authority under the collective agreement by taking jurisdiction over the controversy. After deciding the jurisdictional question, the Court went on to state, at page 347:

The [JCC] was entitled ... to integrate the seniority lists upon some rational basis, and its decision to integrate lists upon the basis of length of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here.

Commenting similarly on the approach of the Courts, Timothy Boyce, in *Fair Representation, The NLRB, and the Courts*, *supra* notes at page 18 of his study:

If the union has had more than one rational alternative, Courts have found no violation, even if they would have decided differently. In *LaTurner v. Burlington Northern Inc.* the union chose to dovetail two seniority lists. The Court held that, although another method for consolidating the rosters would have satisfied a larger number of the employees affected by the merger, the Court would not have substituted its view for those of the union. When the union's position is the result of a rational process, Courts have thus been willing to let the decision stand.

And further, at page 24, the author notes that the Courts, recognizing the unavailability of a solution which will satisfy everyone, have "disclaimed any competence or authority to choose which solution was best." See *Truck Drivers Local 568 v. NLRB*, (1967) 379 F. 2d 137.

21. In the present case, Mr. Teichmann himself was able to see the difficulty which the International would face in reconciling the conflicting claims of the Local 879 and Local 230 men, bearing in mind in particular the fact that *both* groups had built up their seniority as members of the same parent organization. As Mr. Teichmann put it, in his candid testimony:

“When it came down to it, I had to ask myself – what would I demand if Dufferin was sold to KBM? I would insist and expect that seniority be protected.”

And further, in explaining why he anticipated that the ruling of the International would perpetuate the decision of the Joint Council:

“It appeared to me that an impartial person removed from the dilemma of representing one group or another, would quickly come to the same conclusion.”

But Mr. Teichmann recognized that he was *not* an “impartial person”, and, notwithstanding his practical assessment of the matter, functioned throughout, we find, solely as an advocate and protector of the interests of his own Local 230 members. Knowing that full dovetailing had been adopted by the Teamster organization in similar situations elsewhere, Mr. Teichmann did his best to negotiate a compromise for his members which would be viewed as fair and acceptable to everyone. Failing that, he did his best to advance the matter to arbitration before the International could rule. But his own men, through the latter half of 1982, were themselves reluctant that such a step be taken, and after that the Local 879 group, with their own section 89 complaint, made it impossible.

22. Once the International had rendered its decision, the Board does not find it arbitrary or unreasonable for Mr. Teichmann to have concluded that his practical options had been exhausted, having regard to the supportable interpretation which the International had placed upon its constitution, and the lack of any apparent irrationality or denial of natural justice in the decision arrived at by the Joint Council. Neither, in terms of the rationality of the Joint Council’s decision itself, was it improper for Mr. Teichmann to be sensitive to the fact that both groups of drivers belonged to Locals of the same parent organization. In addition, mergers and acquisitions had become an issue of some concern in this industry, and it was not unreasonable for Mr. Teichmann to reflect on the possibility that, the next time the issue arose, it might be his own men out on the street looking for the support of the Teamster organization. For all of the foregoing reasons, the Board finds no violation of the section 68 standard to have been committed by the respondent.

23. The complaint is accordingly dismissed.

1317-83-R United Food and Commercial Workers, International Union, AFL-CIO-CLC, Applicant, v. **F. B. I. Foods Ltd.**, Processing Division, Respondent, v. Employee, Objector

Bargaining Unit – Build-Up – Practice and Procedure – Hiring of additional employees dependent upon sales reaching projected levels – Degree of certainty and company control required for invocation of “build-up” doctrine not met – Usual Board policy not to exclude “seasonal employees” based on cyclical nature of business – Limited exception in particular industries – Whether quality control technicians coming within permitted exception

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and B. L. Armstrong.

APPEARANCES: *Stephen Krashinsky, Bruce Zufelt, Jim Foshay for the applicant; Gordon J. Weir and William Jeffery for the respondent; no one for the objector.*

DECISION OF THE BOARD; December 12, 1983

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(l)(p) of the *Labour Relations Act*.
3. The parties are already covered by a collective agreement for its main production group, the recognition clause of which reads:

The company recognizes the union as the sole and exclusive collective bargaining agent for all its employees at Trenton, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, plant clerical staff, supervisory trainees, security guards, quality control technicians, persons regularly employed for twenty-four (24) hours per week or less, students employed during the school vacation period, and seasonal employees as defined in Article 17:09 herein.

Both parties were in agreement that the description of an appropriate bargaining unit could read “all quality control technicians”, as those are the only excluded persons presently employed by the respondent in the “tag-end” to the production unit. Because of the possibility of future classifications being hired, however, the Board indicated its preference for the normal “tag-end” description, in terms of “all employees not covered by the subsisting collective agreement”. The applicant indicated that if that were the description to be adopted, then it would have no objection to the respondent’s sought-after exclusion for students and part-time employees. The only issue remaining for the parties, therefore, was the exclusion which the respondent sought for “seasonal employees”, to mirror, it said, the regular production unit. The Board accordingly heard the evidence and representations of the parties with respect to the exclusion of the quality control technician, Randy Brown, whom the respondent sought to exclude as “seasonal”, as well as the evidence and representations of the parties with respect to the respondent’s request for deferral of consideration of this application on the grounds

of a predicted “build-up” within the bargaining unit. The Board then issued the following oral reasons for decision.

4. With respect to the issue of “build-up”, the company witnesses were notable for their candour, and satisfied the Board of the substance and sincerity of the company’s plans. The company in fact has in operation both its new liquifill (gable-pak) and tetra-pak lines, and the Board is satisfied of the need of the respondent for four quality control technicians on a full-time basis by January of 1984. There were, however, as of the date of the application, either two or three quality control technicians employed in the unit, depending on the “seasonality” issue, so that a “build-up” to the number of 4, as of January, would be insufficient to cause the Board to grant the respondent’s request for deferral (there being, in the Board’s view, a representative number of persons employed in the bargaining unit as of the date of the application). The respondent must effectively rely, therefore, on its projections for an additional two quality control technicians to be hired sometime in April or May of 1984, on the basis that it is the company’s hope that its present sales projections will permit the operation of its new \$4 million equipment on a three-shift basis. The company witnesses’ own evidence, however, underscores the degree of uncertainty and lack of company control still attaching to that aspect of the company’s “build-up” plans, both witnesses acknowledging that such further development is dependent upon sales in fact reaching projected levels. The Board accepts the common-sense submission that an investment of \$4 million leaves no doubt that the company is aiming for a full utilization in production from this equipment. The prospect of realizing that, however, remains a calculated risk on the part of the respondent, however, and no evidence was put before the Board on the basis on which that risk, or the sales projections, had been calculated. Irrespective of that, however, the company’s witnesses had to concede that whether the equipment will in fact be fully utilized is dependent on how sales in fact prove out, and the Board notes in that regard that the company’s projections are for a product and a method of packaging which, from this company’s point of view, are totally untried, and have not yet even reached the store shelves. It is simply not possible to say on the evidence that the test required by the Board in its jurisprudence over the years for the degree of certainty and company control has been met. See, e.g., *Custom Leather Products Limited*, [1981] OLRB Rep. Aug. 1128, and the cases cited therein. The refusal on the part of the Board to entertain an application for certification in the normal way is discretionary, and the Board in the present circumstances does not find a justification to exercise that extraordinary discretion to defer.

5. The Board accordingly will deal with the present application as filed, the only remaining issue being that of the “seasonal” exclusion. The Board’s normal approach, recently reviewed and summarized in the case of *Filkon Food Services Limited*, [1981] OLRB Rep. May 1771, is not to take into account normal fluctuations in the company’s work force, based on the cyclical nature of a particular business. A limited exception to this has developed in the case of certain industries such as tobacco harvesting, canning, and similar food-processing. The operation of the respondent falls within this limited class, and the exclusion in the scope clause for production employees hired on a “seasonal” basis is reflective of that. It remains to be decided, however, whether that exclusion ought to be extended beyond the actual production group, and to do that it is necessary to consider the basis for that “seasonal” exclusion. The cases themselves contain little articulation of that basis, but it would appear to be a reasonable conclusion that it is based upon the existence of a totally distinct community of interest, both in terms of the specific period of hiring and the nature of the work performed. This would appear to be consistent with the way the exclusion is dealt with in the

present parties' collective agreement, particularly in terms of the definition of the period for which a "seasonal" employee is hired. And while the evidence in this case discloses some overlap in the nature of work which both "seasonal" employees and the permanent work force perform, by and large one can see a discernible distinction in the work for which the "seasonal" employees are hired. Neither of these distinctions are borne out by the evidence with respect to the quality control laboratory. Indeed, the evidence with respect to Mr. Brown, the individual in dispute, confirms that he tends to be hired simply in accordance with the company's needs, rather than for any period specifically defined by the apple season itself. He has, for example, been retained in the past at least until January to work on clamato juice. Similarly, the evidence satisfies us that, apart from some difference in emphasis in the assignment of work between the "temporary" and "permanent" technicians, the work performed by the two categories overlaps to a substantial degree, and is effectively the same. The case of the quality control technicians, therefore, is much closer to that involving no more than cyclical fluctuations within a particular classification, and which the Board would find does not affect the composition of the appropriate bargaining unit. Alternatively, the Board would find that there are, or have been, no "seasonal" employees employed in the proposed bargaining unit, as that term has been used either by the parties or by the Board in other cases, and the designation of such an exclusion would be inappropriate on that basis as well. The appropriate bargaining unit accordingly will be defined without reference to a "seasonal" exclusion.

6. Based on all of the material before it the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on September 26, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. The Board accordingly certifies the applicant as exclusive bargaining agent for all employees of the respondent at its plant in Trenton, save and except forepersons and those above the rank of forepersons, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements.

8. A certificate will issue to the applicant.

1540-83-U Carlos Garcia, Louis Hackl, Jose Cuervo, Adrian Ghirardi and Jorge Menegotti, Complainants, v. United Steelworkers of America, and **Inglis Ltd.** Respondents

Duty of Fair Representation – Unfair Labour Practice – Complainants’ bumping rights grievances among many withdrawn during contract negotiations – Historical practice to clear backlog of outstanding grievances before ratification of contract – No “non-caring” attitude – No breach

BEFORE: R. D. Howe, Vice-Chairman.

APPEARANCES: Carlos Garcia, Jose Cuervo, Jorge Menegotti and L. Hackl for the complainants; Keith Oleksiuk and Mike Hersh for the respondent trade union; Terrance R. Olmstead and Julian Kingsley for the respondent company.

DECISION OF THE BOARD; December 13, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainants allege that they have been dealt with by the respondent United Steelworkers of America (referred to in this decision as the “union”) contrary to the provisions of sections 68 and 69 of the Act. In particular, they allege that certain grievances were arbitrarily withdrawn by union officials, and request from this Board a direction that those grievances be referred to arbitration.

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3. The complainants are all employees of Inglis Ltd. (referred to in this decision as the “company”) who are classified as tool and die makers. From time to time they have been called upon by the company to perform some maintenance work of the type normally performed by the company’s millwrights. While the evidence is somewhat vague concerning the particulars of such work, it appears that the performance of maintenance work by tool and die workers generally occurred during periods in which there was more maintenance work to be performed than could be readily performed by the company’s millwrights, or during the summer shutdown period.

4. In April of 1982 the company notified the complainants that they would be laid off from April 26 to May 7 inclusive. On April 23, 1982, the complainants grieved their forthcoming layoff. In their grievance, the complainants expressed their desire to exercise (what they perceived to be) “their seniority rights under the Collective Agreement to work in the Maintenance Dept. for the duration of the layoff”, and demanded “full compensation for all monies lost” in the event they were “refused the right to work in the Maintenance Dept.” In support of their position, they referred to the following provisions of the April 1, 1980 to March 31, 1983 collective agreement between the company and the union (on behalf of its Local 2900):

Article 2 – General Understanding and Purpose

2:01 The purpose of this Agreement is to set forth formally, the rates of pay, hours of work and the working conditions that have been agreed upon, along with procedures for dealing with grievances and complaints and to promote orderly and peaceful relations between the Company and its employees.

Article 32 – Layoff Procedure

32:01 Step 1 by Department.

Where circumstances require a reduction in the working force, seniority shall be the guiding factor. The employee will be given a job at his current rate, or failing this, any job he is willing and able to do held by an employee with less seniority.

32:02 Step 2 by Seniority Unit.

If the employee's seniority cannot be exercised in the department, he will then exercise it in the seniority unit as a whole under the criteria set out in 32:01 above.

32.03 An employee displaced from his job as a result of the above procedure shall similarly exercise his seniority to be kept in employment, unless his seniority is sufficiently low that he may be laid off in any lay-off then taking place in his seniority unit.

32:04 The words "Seniority Unit" as used in this and other Articles of this Agreement refer to the seniority units as defined in Clause 24:01.

(Plantwide Layoffs)

32:05 When it is necessary to reduce the overall working force in a seniority unit by layoff, such layoff will begin with the employees of lowest seniority in the seniority unit, and employees will be laid off in inverse order of seniority. Probationary employees will be the first to be laid off.

32:06 In a transfer due to a layoff, the employee shall receive no less than his former rate for at least two (2) weeks.

Article 34 – By-Passing of employee

34:01 (a) The only departure from laying off in such order will be made in cases where the work remaining to be done in a seniority unit, at the time of the layoff, cannot be done by employees remaining, in which case, an employee or employees of lower seniority in the seniority unit may be retained in employment and by-passed in the layoff.

(b) The Company will discuss all such cases with the Union and every effort will be made to keep such cases to a minimum, but the Company

may, following discussion, by-pass such employees and the Union may grieve thereon, if agreement cannot be

reached that the services of such employees are essential to the Company's operation at that time.

34:02 (a) In the event of a dispute involving the by-passing of an employee in layoff, the Company will grant for reasonable cause a trial period of up to ten (10) working days to an employee of greater seniority affected by the layoff whom the Union claims can do the job. The Company will acquaint the employee with such information as is normally required to do the job, including the procedures followed and the materials used.

(b) In the event that an employee is given a trial period and is not successful in convincing the Company that he can do the job satisfactorily, the employee will be placed on a job by the Company, held by an employee with lower seniority.

34:03 In the event that the job for which an employee has been by-passed is temporarily discontinued, he may be assigned to other work for a maximum of three (3) working days.

If the employee has not returned to the by-passed job within a period of three (3) working days, he shall be laid off without notice and placed on the Recall List in order of his seniority.

While performing a by-passed job the employee who has been maintained out of seniority may not accept another permanent job while there are employees on the Recall List with greater seniority who are able and willing to do the job.

5. In its first step reply to that grievance, the company denied the complainants' request (to bump into the maintenance department) on the ground that none of the complainants had a "Provincial Government Ministries [sic] of Colleges & University [sic] Certificate of Qualification for a Millwright". The grievance was then referred to the second step of the grievance procedure. The company's second step reply is contained in the following letter dated May 17, 1982 from J. W. Kingsley, Manager of Manufacturing Engineering Services, to A. Sobie, the Chief Steward of Local 2900:

L. Hackl and J. Cuerdo who attended the second stage grievance meeting made the point that they had worked in the Maintenance department previously. They could not quote firm dates, but gave a range of years from 1973 to 1975. Personnel records were checked but there are no entries to confirm their statements.

Prior to the grievance being written, discussion had taken place between certain Tool makers and the General Foreman of the Maintenance department. I. McCreadie had made it abundantly clear that a prime requisite for any person employed by Inglis as a millwright was that the person must hold the Provincial Government Ministries of Colleges and Universities Certificate of Qualification for a Millwright.

This is noted under Factor 2 of the Job Classification of Millwright. A copy of the Job Classification sheet is attached.

Job Description Classifications which constitute the Co-operative Wage Study (C.W.S.) Manual, are referred to under Article 43 (wages) of the Collective Agreement. Article 43:01 states that "the Manual is incorporated into this agreement as Appendix 'A' and its provisions shall apply as if set forth in full herein".

This clearly shows that there was no violation of the Collective Agreement, and therefore this grievance is denied.

6. Article 43:01 of the aforementioned collective agreement provides:

43:01 The Co-operative Wage Study (C.W.S.) Manual for job Description Classification and Wage Administration, dated May 28, 1986 (herein referred to as "the Manual") is incorporated into this Agreement as Appendix "A" and its provisions shall apply as if set forth in full herein. Reference in the Manual to such jobs as trade or craft, assigned maintenance, clerical or technical, group leader, testing or inspection, learner, apprentice, instructor, shall not of itself establish existence of such jobs in the operations of the Company or determine that such jobs are within or are not within the jurisdiction of the bargaining unit.

7. With the exception of Carlos Garcia's grievance dated August 17, 1982 (which will be considered in the next paragraph of this decision), the other grievances which form the subject matter of the present complaint pertain to various other periods of time during which the complainants allege that they should have been permitted to bump into the maintenance department. Those other grievances were also denied by the company on the ground that the complainants lacked the required certificate of qualification for a millwright.

8. On August 17, 1982, Carlos Garcia filed the following grievance with the company:

I was asked to repair baseplate of press in press room. I objected on the grounds it was millwrights work and I did it under protest. The company had on a previous occasion refused me the right to bump into maintenance when I was laid off.

The settlement requested by Mr. Garcia in that grievance was:

The company to cease this harassment and make up their mind whether I am capable of doing this type of work and settling my previous grievance honestly.

It is clear from the evidence as a whole that Mr. Garcia filed that evidence (with the assistance of his steward, Eric Holt) in an attempt to support his layoff grievance with "recorded written evidence" concerning the incident described in the (August 17, 1982) grievance. Mr. Garcia did not expect or intend it to be processed beyond the first step of the grievance procedure or to form the subject matter of separate arbitration proceedings. Mr. Garcia was, at all material times, content to have that grievance "lie dormant" after being filed at step one. Thus, having regard to all the evidence, the Board finds that the fact that the union did not further process that grievance was based upon its (correct) understanding of Mr. Garcia's motivation for filing it, and does not, in the circumstances of this case, constitute a breach of any provision of the *Labour Relations Act*.

9. The complainants' layoff grievances were subsequently processed by the union to the third step of the grievance procedure. The company's third step reply is contained in the following letter dated December 7, 1982 from T. R. Olmstead, the company's Industrial Relations Manager, to Mike Hersh, the President of Local 2900:

With the introduction of the CWS program it is understood that a job is classified based on the requirements as described under the twelve factor sub sections.

One of the jointly agreed minimum requirements to hold a permanent Millwrights position is an Ontario Certificate of Qualification as a Millwright.

While all of the grievors are certainly "skilled tradesmen" and are capable of performing many of the duties assigned to the millwrights, they have not qualified as a millwright under either the CWS classification or under the Ontario Government Certificate of Qualification program and are therefore not eligible to hold this position at Inglis.

Some of the grievors have worked under the previous job description of Maintenance Man prior to October 15, 1976 when the present classification was introduced, however, the prerequisites changed at that time.

The grievors claim that they are being asked to do Millwright's work is not necessarily so. Many tasks in Maintenance are not clearly defined and as such it is impossible to classify them as anybody's work. To the best of my knowledge, the grievors are not being asked to work outside of their classification.

For all of the above reasons these grievances must be denied.

One or more of the complainants were present at each step of the grievance procedure and union officials duly informed the complainants of each of the company's answers to their grievances.

10. Mr. Hersh has been the President of Local 2900 for approximately one and a half years. Before that he held a number of other positions with the Local, including vice-president, chief steward, steward, and negotiating committee member. As part of his investigation into the merits of the complainants' grievances, Mr. Hersh conferred with the members of the Co-operative Wage Study ("C.W.S.") Committee concerning the millwright job descriptions contained in the C.W.S. Manual (incorporated into the collective agreement by reference in Article 43:01, as set forth above). Three of the members of that committee are union members who "took a year to go to school" for the purpose of familiarizing themselves with the Co-operative Wage Study Manual and its implementation. Their responsibilities include preparation of job descriptions, such as that pertaining to millwrights.

11. Mr. Hersh's investigation confirmed that the millwright job description adopted by the company, with the consent of the union, on October 15, 1976, included an "Ont. Cert. of Qualif. for a Const. Millwright" as part of its "employment training and experience" requirements. The members of the C.W.S. Committee were of the opinion that the complainants' grievances would not be successful because none of the complainants held such a certificate. It was their opinion that, in view of the incorporation by reference of the C.W.S. Manual, and the jointly agreed upon requirement of a millwright's certificate, the complainants would not be found by an arbitrator to be "able to do" a millwright's job, within the meaning of Article 32 of the collective agreement.

12. Mr. Hersh also discussed the complainants' grievances with the stewards, who (along with Mr. Hersh himself) were sympathetic to the complainants' position as they felt that it was wrong for the company to call upon the complainants to perform millwrights' work on some occasions and then deny them any opportunity to bump millwrights in cases of layoff. Thus, union officials vigorously argued in favour of the complainants' position at each step of the grievance procedure but, unfortunately for the complainants, their position was consistently rejected by the company.

13. After receiving the company's third step reply, the union processed the complainants' layoff grievances to arbitration, in accordance with the provisions of the collective agreement. At that time there were approximately 200 unresolved grievances outstanding between the respondents. Since it had long been the practice of the respondents to consider and resolve outstanding grievances during the course of collective bargaining, the union grievance committee met in December of 1982 to consider which of the outstanding grievances were "weak" and which of them were "strong" grievances which they would "stick with" in the forthcoming negotiations for a new collective agreement. At a union meeting held on January 27, 1983, the membership unanimously approved a package of union bargaining proposals which included a proposal that all outstanding grievances be resolved prior to ratification.

14. During the ensuing negotiations, the respondents each established a subcommittee to consider and resolve outstanding grievances. Those subcommittees initially spent a day going over each of the grievances individually. They then met two or three more times to consider various proposals for resolving the grievances. The complainants' layoff grievances remained unresolved until the "very end" when, following discussions with the main negotiating team and following rejection by the company of a union proposal that each of the complainants' be compensated for twenty hours' lost wages, the complainants' grievances were withdrawn as part of a final package in which thirty-three grievances were resolved in favour of the union.

and the balance (including the complainants' grievances) were withdrawn. In agreeing to withdraw the complainants' grievances, union officials considered their merits and concluded that the grievances would not succeed at arbitration in view of the C.W.S. millwright job description which had been jointly agreed upon by the union and the company, and in view of Article 43 of the Agreement which specifically incorporated the C.W.S. Manual by reference.

15. While Mr. Hersh was of the view that the union could not win the complainants' grievances at arbitration, he candidly told the Board that the union might have been able to win some of the other grievances that were withdrawn during negotiations. However, while he "wasn't happy to drop them", he "couldn't see keeping the people on strike for them" when the membership had already been on strike for six weeks. (The strike commenced on April 7, 1983 and continued until mid May).

16. At the union ratification meeting, Mr. Garcia questioned Mr. Hersh about the status of his layoff grievances. Since Mr. Hersh "didn't feel it was the time to go over all 200 grievances", he told Mr. Garcia that he would be happy to discuss the disposition of his grievances later on. In support of that position, he noted that it had never been the union's practice to discuss at ratification meetings the details of disposition of individual grievances because "people don't want to hear about 200 grievances; they want to hear about what took them out on the street". Mr. Hersh also noted the impracticality of discussing at a ratification meeting the merits and settlement details of hundreds of individual grievances. (Approximately 700 grievances were resolved in the round of negotiations which preceded the 1980-83 collective agreement.)

17. Following that ratification meeting (at which the majority voted in favour of ratifying the settlement), Mr. Hersh provided the stewards with detailed information about the respondents' grievance settlement agreement and instructed them to explain that information to employees in their respective areas. The complainant Louis Hackl subsequently met with Mr. Hersh and had an amicable discussion with him concerning the disposition of the complainants' grievances. At Mr. Hackl's request, Mr. Hersh provided the following written explanation to all of the tool and die workers on or about June 15, 1983:

Tool Room Employees

Dear Brothers of Department 822

In response to your request concerning grievances #374,387,390 and 394 - 82, I shall express to you the opinions of the C.W.S., Grievance, and Negotiating Committees.

Your concern about performing elements of the Millwright's job description on a number of occasions in the past was well documented by Brothers Hackl, Cuerdo and Garcia at different stages of the grievance procedure. This is a legitimate complaint, and on that basis the grievances mentioned above were processed and pursued through three (3) stages right up to Negotiations.

As you are aware, the General Membership Meeting of January 29, 1983 gave the Negotiating Committee the prerogative to settle all outstanding grievances prior to a new contract being ratified. This is not necessarily the best manner in which to handle grievances, but given the backlog of grievances (close to 200) and the slowness and inefficiency of the arbitration procedure, we had little choice.

At meetings with the Company during Negotiations, we once again asked that senior employees of the Tool Room be compensated for all monies lost due to not being called in to perform Millwright's jobs held by junior employees during the Work Share Program. Our arguments were those I have referred to above, namely, that you have been directed to perform certain elements of the Millwright's job procedure in the past.

But after much discussion among ourselves, and weighing the opinions of the C.W.S. and Grievance Committees, the Negotiating Committee felt that this was as far as we were willing to go with these grievances. Consider the following:

- 1./ As agreed to by both the Company and the Union members of the C.S.W. Committee, Factor 2 of the job classification for a Millwright states that he/she must hold an Ontario Certificate. No Toolmaker came forward with such a certificate. Had the Company called in a Toolmaker during the Work Share Program to perform a full Millwright's job, then all the Millwright's [sic] would have had a grievance far more legitimate than yours.
- 2./ Your desire to cross Trades with these grievances is totally contrary to the principle that you have been at the forefront of upholding in the past, that is, that each Trade be clear demarkated [sic] and that there be no crossover.

I do not claim to be an expert on these matters, but those with more experience than I, concur with my comments. I hope this answers your inquiries.

Fraternally yours,

(signed) Mike Hersh
President Local 2900
U.S.W.A.

The veracity of that information was confirmed by Mr. Hersh in his candid and credible testimony before the Board in respect of the present complaint.

18. In his evidence before the Board, Mr. Hersh observed that although the complainants' grievances had been withdrawn, the union had made it clear to the company that tool and die makers were not happy about being called upon to perform millwrights' work in order to meet the company's needs, when they were not, in turn, eligible to bump millwrights to

meet their own needs during layoffs. He further indicated that the union is prepared to duly process any future grievances which the tool and die makers may wish to file with respect to being required by management to perform millwrights' work. The evidence also establishes that during the course of negotiations, the respondents' representatives discussed the undesirability of accumulating grievances at the end of a collective agreement, and agreed to modify the grievance procedure in an effort to avoid recurrence of that situation.

19. As indicated above, the complainants allege that the union has contravened sections 68 and 69 of the Act. If section 69 has any application where, as in the present case, "hiring hall" operations are not in question, then the reach of that section is, at best, no greater than that of section 68. (For a discussion of the application of section 69 see, generally, *Joe Portiss*, [1983] OLRB Rep. July 1160). Accordingly, the Board will proceed to consider whether the complainants have established a contravention by the union of section 68, which provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

20. There is no evidence whatsoever before the Board of any bad faith or discrimination by the union in its representation of the complainants, nor is it possible to conclude on the facts set forth above that the union has acted in a manner that is arbitrary. The thorough attention given to the complainant's grievances by Mr. Hersh and other union officials does not reflect the type of "not caring", reckless, capricious, perfunctory, or grossly negligent approach proscribed by section 68. (For a discussion of the ambit of the term "arbitrary" in the context of section 68 of the Act, see, for example, *I.T.E. Industries*, [1980] OLRB Rep. July 1001, and *Bedard Girard Ontario Limited*, [1981] OLRB Rep. Oct. 1318. See also Brown, *The "Arbitrary", "Discriminatory" and "Bad Faith" Tests Under the Duty of Fair Representation in Ontario* (1982), 60 C.B.R. 412, at pp. 440-448.)

21. The Board has consistently held that section 68 of the Act does not require a union to carry any particular grievance through to arbitration simply because a grievor so desires. Moreover, it is well established in the Board's jurisprudence that it is not the function of the Board, in applying section 68, to "second guess" a union decision not to arbitrate a particular grievance (or grievances). A union is not required to be correct in its assessment of the merits of a grievance; it is sufficient if union officials have directed their minds to the grievance and arrived at a reasoned judgement about what to do, after assessing the various relevant considerations, including how critical the subject matter of the grievance is and how much validity the grievance has. The Board has also held that a procedure which ties grievance negotiations to the negotiation of a new collective agreement in order to provide underlying urgency for compromise and rational discussion is not inherently unfair or arbitrary, but rather is one legitimate (although, as recognized by the respondents, by no means necessarily the most desirable) procedure for preventing the administration of a collective agreement from becoming bogged down in a quagmire of unresolved disputes. (See, for example, *Nick Bachiu*, [1975] OLRB Rep. Dec. 919.)

22. In the present case, union officials duly directed their minds to the merits of the

complainants' grievances and concluded, after carefully investigating the grievances and consulting with members of the C.W.S. Committee, that they would not be successful at arbitration. Under the pressures of collective bargaining in the context of a six week strike, the union bargaining committee, mandated by the membership to resolve all outstanding grievances through collective bargaining, pressed the company to allow the grievances (in whole or in part), but without success. Faced with the alternative of an even longer strike, the bargaining committee, after duly considering the merits of the complainants' grievances, decided (not unreasonably) that it was in the best interests of the membership as a whole to withdraw the grievances in question as part of a package in which the company agreed to favourably resolve 33 other grievances.

23. Having regard to all the evidence and the submissions of the parties, the Board finds that the respondent trade union did not contravene sections 68 or 69 of the *Labour Relations Act*.

24. For the foregoing reasons, this complaint is hereby dismissed.

1207-83-R Edmund Northcott & A Group of K-Mart Employees, Applicant, v. Teamsters Local 419, Respondent, v, **K Mart Canada Limited**, Intervener

Constitutional Law – Practice and Procedure – Termination – Prior termination application dismissed for failure to demonstrate voluntariness of petition – Board barring subsequent application – Balancing of employee free choice and stability of collective bargaining involved – Breach of duty of fair representation even if established not causing Board to permit second application – Refusal to entertain second application not infringing freedom of expression in charter

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members H. Kobryn and J. A. Ronson.

APPEARANCES: Michael Gordon, Walter Fedunchar and Ed Northcott for the applicant; J. J. Nyman and G. O'Driscoll for the respondent; Robert A. McDermid and J. Fox for the intervener.

DECISION OF RICHARD M. BROWN, VICE-CHAIRMAN AND BOARD MEMBER H. KOBRYN; December 5, 1983

1. This application under section 57(2) of the *Labour Relations Act*, for a declaration that the union no longer represents the employees in the bargaining unit, was filed on August 31, 1983. By decision dated August 26, 1983, another panel of the Board dismissed an earlier termination application filed on July 8, 1983, relating to the same bargaining unit. Consequently, the union has asked the Board to exercise its discretion under section 103(2)(i) and thereby to refuse to entertain the second application.

2. All of the parties to these proceedings have agreed to certain stipulated facts relating

to ongoing collective bargaining between the union and the employer for the renewal of a collective agreement that expired on August 31st, 1983. By letter dated June 1, 1983 the union gave the employer notice to bargain, and the union's proposed revisions to the existing contract were presented to management on July 13th. On August 2nd, both parties to the negotiations agreed to suspend collective bargaining until the first application for termination was considered by the Board. At this point, no negotiation meetings had been held. Shortly after the Board rendered its first decision, and before the second application was filed, the union contacted the employer and they agreed to meet on September 26th. They have also met on two other occasions since that date. The parties have further agreed that Mr. Northcott, the present applicant, first retained counsel on September 8th.

3. Counsel for the applicant also sought to call evidence relating to the union's dealings with them. At the request of the chairman of this panel, he stipulated the facts upon which he relied:

The group of objecting employees state, and the fact is, that throughout the period of time from the date when the Union entered into a collective agreement with the intervening employer, there has been a concerted effort by the Trade Union to conceal from the objecting employees any information about the following:

- (1) The dates, times or places of Union meetings;
- (2) The distribution of copies of the Constitution of the Trade Union;
- (3) The provision of the objecting employees of copies of the collective agreement between the Employer and the Trade Union;
- (4) A concerted refusal, or failure to obtain from employees and instructions with respect to collective bargaining;
- (5) The failure to report to the objecting employees the results of any Union meetings or activities as a collective bargaining agent in respect of the employees as aforesaid;
- (6) The refusal by Union stewards to respond to questions by objecting employees as to what happens at Union meetings, what is going on in terms of negotiations or to elicit any admissions from employees with respect to matters to be taken up in negotiations;

In support of the foregoing the objecting employees state as follows:

1. The first collective agreement between the Company and the Union was ratified after a vote of eighteen to seventeen against ratification over the objections of the objecting employees. Subsequent to the imposition of the collective agreement upon the employees by the Trade Union, employee Ron Johnston, asked representatives of the Union for a copy of the Union Constitution. He was assured that he would be given a copy

and has not, since the date of ratification, been given a copy of the Constitution of the said Trade Union.

2. All of the objecting employees state, and the fact is, that they have never been informed of any meetings of the Trade Union since the ratification of the collective agreement in 1980 no have their views been solicited as to the matters which ought to be negotiated for in the current round of negotiations.

3. Employee Mike Lavelle states, and the fact is, that shortly after the signing of the collective agreement in 1980 he asked his Shop Steward, one Jack Presley, for a copy of the collective agreement. He was assured by Mr. Presley that he would receive a copy of the said collective agreement but no such document has ever been provided to him. In addition his questions with respect to what happens at Union meetings never gets answers.

4. Employee Rowend Gargoin states, and the fact is, that any questions which he has asked of stewards with respect to proceedings at Union meetings have brought either response or a simple "shrug of the shoulder". In addition to the foregoing after the 1980 collective agreement had been signed he was advised that he would be given a copy of the collective agreement and of the Union Constitution. Neither of such documents have been provided to him. He is only informed of meetings of members of the bargaining unit after the meetings have taken place.

5. Employee Ed Northcott states, and the fact is, that even though he is a card carrying member of the Union he has never received an invitation to attend Union meetings. He further states that the former Chief Steward of the Union, one Chester Stewart Russell, advised him: "I was told not to tell you so don't ask me any questions regarding the Union."

6. Employee Dale Wendover states, and the fact is, that the Union had never informed him about anything having to do with collective bargaining and that it is his understanding that the Union simply "doesn't bother" with any of those employees who are not part of a small clique who support the Union.

7. Employee Gord MacKenzie states, and the fact is, that even though he has been invited to join the Union he has never been invited to a meeting and has never been informed during the present negotiations as to what is transpiring because the Union does not inform any of the members of the bargaining unit who are not card carrying members of the Union as to the activities which the Union is taking with respect to the representation of employees.

8. The employees further state, and the fact is, that following the signing of the agreement between the Company and the Union in 1980 the stewards were advised as a group that they were not to help any of the employees who were not members of the Union.

9. The employees further state, and the fact is, that the Chief Steward, Jack Presley, advised stewards not to talk to employees who weren't members because they were not trusted and the Union did not wish them to have any information regarding its efforts in a representative capacity.

10. The employees further state, and the fact is, that no meetings of the Union membership or of employees in the bargaining unit have, been called during the past three years or, in the alternative, that if there have been such meetings, notices of same have not been provided to employees.

As counsel for the union did not agree to any of these stipulations, the parties were called upon to address argument to the facts alleged, on the understanding that, if we decide that on these facts the application would be entertained, the applicant would be called upon to prove these allegations before a final decision was issued.

4. The union relies upon section 103(2)(i) of the Act:

103 (2) Without limiting the generality of subsection (1), the Board has power,

(i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

This section grants the Board a discretion to refuse to entertain successive applications relating to the representation of employees in a particular bargaining unit.

5. Section 103(2)(i), like several other provisions of the *Labour Relations Act*, is designed to balance two conflicting policy objectives. The first is the freedom of employees, by a decision of the majority, to withdraw from the world of collective bargaining. The other goal is stability in employment relations. Both employers and employees have an interest in a measure of continuity in the process whereby terms and conditions of employment are determined. An application to terminate bargaining rights, successful or not, impairs the functioning of a collective bargaining relationship that was when created, and still may be, the choice of a majority of employees.

6. The legislature has sought to reconcile these competing objectives by permitting

termination applications to be made only at certain times. Section 57(1) grants a newly certified union protection against challenges to its bargaining rights for a period of one year. Pursuant to section 61(1) and (3), the duration of this shelter may be expanded depending upon when conciliation proceedings are initiated and whether or not a strike occurs. However, there is always a lengthy period during which bargaining rights are unassailable. In this way, a fledgling bargaining agent is granted an opportunity to negotiate a first contract, a task that often proves to be more difficult than renewing an expired collective agreement. Employees exercise their choice in the certification process, and the expression of any change of heart is stayed until collective bargaining is allowed a reasonable opportunity to bear fruit.

7. Once a collective agreement is negotiated, it bars termination applications during its life, except in the last two months, according to section 57(2). The maximum duration of this bar is thirty-four months. The contract bar assures both employers and employees that the deal struck at the bargaining table – which by statute must contain a prohibition against mid-contract strikes – cannot be undone by a renunciation of the union by a majority of employees. On the other hand, the statute grants employees an opportunity to reject their bargaining agent in the open season that occurs during the last two months of a collective agreement.

8. The open season that commences two months before the expiration of a collective agreement continues to operate after the contract ends, except when conciliation proceedings are underway: see section 61(2). Applications are barred during conciliation because legal proceedings would inhibit the efforts of employer and union to negotiate a collective agreement.

9. There is one final piece to the statutory framework for determining the timeliness of termination applications. The legislature decided that in some circumstances a restriction ought to be placed on repeat applications made during the open season. Rather than enacting detailed statutory rules, the Board was granted a discretion to refuse to entertain a second or subsequent application, pursuant to section 103(2)(i). In other words, the Act delegates to the Board the task of striking an appropriate balance between employee free choice and stable industrial relations in the context of successive termination applications.

10. In this case, we are concerned with the temporal restrictions that apply to termination applications, but we digress to observe that the same limitations are imposed, by sections 5(4) and (5), 61 and 103(2)(i), when one union seeks to displace another.

11. The Board has structured its discretion under section 103(2)(i) by reference to the types of considerations that guided the legislature in defining the open season. The seminal case, *Trinidad Leaseholds (Canada) Ltd.*, 52 CLLC ¶17,005, involved two successive challenges to an incumbent union by a rival labour organization. The decision not to entertain the second application, which was filed shortly after the first was dismissed, was arrived at by balancing the competing concerns of employee choice and stable industrial relations:

The question of representation which we are now asked to determine was tried by the Board as recently as July 27, 1949, at which time the Board found that the applicant did not have as members in good standing a majority of the employees concerned. *The right of the employees affected to select a new bargaining agent has thus been fully recognized although in actual fact, no new bargaining agent was designated. We must now*

take into account what is, as indicated by regulation 7(4), the equally important consideration of stability and continuity in collective bargaining. Our earlier decision, by implication, identified the intervener as the authorized bargaining agent of the employees affected. Little purpose was served if the right of the intervener to continue to represent those employees was immediately thereafter again subject to question at the instance of the same applicant. The respondent and the intervener have inevitably been hampered in their collective bargaining activities during the period when they would ordinarily have been directing every reasonable effort toward the negotiation of a renewal of the collective agreement. It is our view that before the Board undertakes a further consideration of the question of representation on an application by the present applicant the respondent and the intervener must be permitted a reasonable period of time during which to carry on collective bargaining without hindrance.

(emphasis added)

12. The evidence in the case at hand clearly establishes that the employer and incumbent union have an active bargaining relationship. Since notice to bargain was served on June 1, 1983, they have not had a reasonable opportunity to conclude a collective agreement. After the first application was filed on July 8th, negotiations were suspended. Although meetings have occurred since this application was launched, a union whose status is in question has little leverage at the bargaining table. With these facts in mind, we have restricted our review of the Board's jurisprudence and our analysis to like situations, in which a second application is filed before a reasonable time for collective bargaining has passed. In this setting, continuity in collective bargaining always points towards barring a second application. Employee free choice points in the opposite direction, but the force of this vector varies.

13. Concern for employee free choice is least compelling shortly after an election has been held. A representation vote provides an accurate gauge of employee wishes at the time they cast their ballots. The validity of the election outcome may be slowly eroded as weeks and months pass, but the public policy of employee free choice is largely satisfied by relying upon the tally on election day for some time thereafter. Barring a second application in these circumstances gives due weight to ongoing collective bargaining.

14. An election is not the only way to determine a question of representation. Another method is to canvass the employees in a bargaining unit, as may occur when a raiding union solicits membership or an employee seeking to terminate bargaining rights circulates a petition. Consider a case in which the applicant initially enlists enough employees to support an application, but changes of heart or employee turnover later deprive the application of sufficient support, so that it is dismissed. If all members of the bargaining unit have been canvassed, they have had a full opportunity to express their views on the question of representation. In this setting, a raiding union that fails to sign up forty-five per cent of the employees is clearly not embraced by a majority. When an application to terminate bargaining rights is not accompanied by the signatures of forty-five per cent of the work force, one can safely infer that a majority still favour collective bargaining. But an applicant is not required by law to approach all employees, and may stop canvassing upon achieving sufficient support to succeed in the absence of changes of heart or employee turnover. In these circumstances,

one cannot say employees have had a full opportunity to express their wishes. Consequently, employee free choice weighs more heavily in favour of entertaining a second application than when an election has been held. There are at least four earlier cases in which a second termination application was filed after the first was dismissed because the applicant suffered a loss of support in the manner described. *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791; *Chapleau Lumber Co.*, [1973] OLRB Rep. Nov. 574; *Dunnville Supermarket Limited*, [1980] OLRB Rep. Aug. 1193; and *Browning-Ferris Industries Ltd.*, [1982] OLRB Rep. Sept. 1253. In each case, the Board declined to entertain the later application in order to facilitate collective bargaining. The Board made no finding as to whether or not all, or most, employees had been canvassed, suggesting that this factor is not relevant. Even though the evidence did not establish that employee wishes had been fully tested, the second application was barred.

15. The same balance between stable industrial relations and employee free choice was struck in *Continental Can Co. of Canada*, [1964] OLRB Rep. Dec. 459, a case involving three successive termination proceedings. The first application was accompanied by a petition signed by the requisite number of employees, but the applicant failed to prove that the signatures were voluntary. In other words, the Board was not satisfied that employees had not signed the petition to avoid retaliation at the hands of their employer. In this context, no firm conclusion can be drawn about the level of support for a union. All of the signatories may have been union supporters who signed the petition to please their employer; or they may have been opposed to the union before the petition appeared and therefore signed it for a reason unrelated to any apprehension relating to their employer. A third possibility is that some employees acted for one reason and some for the other. One cannot conclude with any certainty that less than forty-five per cent of the employees were opposed to the union when the first application was filed. Unable to draw this conclusion, one cannot infer from it that a majority of the employees continued to support the union at that time. Although the wishes of employees had not been fully tested, the Board declined to entertain the second application so as to foster collective bargaining.

16. This approach was also followed in two early cases where a flaw in the union's membership evidence led to the dismissal of an application to displace an incumbent bargaining agent. In *Filey-Hall Paper Box Co.*, 52 CLLC ¶17,037 sixty per cent of the employees had paid one dollar and signed a union card, but they did so before the holding of the meeting at which the union was formed, and the time sequence invalidated the membership evidence. The applicant in *Windsor Lumber Co.*, 58 CLLC ¶18,104 possessed fresh membership evidence, but by mistake filed older cards that were stale. In both cases, a second application was not entertained.

17. In all of these cases, the Board refused to permit a second application until a reasonable time for collective bargaining had elapsed, even though the wishes of employees had not been tested. By contrast, the Board has on at least three occasions allowed a second application on the heels of the first in the course of an open season.

18. The first such decision was *Dupont of Canada Limited*, [1967] OLRB Rep. Nov. 737, a most unusual case involving three unions. In the first proceeding, the incumbent bargaining agent was challenged by the other two unions – one applied for certification five days after the other. The Board fixed the date of the earlier application as the application date for both raiding unions, and refused to extend the terminal date at the instance of the union that filed last. Deprived of the normal length of time to submit membership evidence, this union

failed to demonstrate the requisite degree of support to have its name on a ballot. An election was held between the remaining two unions, and the incumbent won. The union that had not been on the ballot then brought a second application. Weighing the right of employees to select a new bargaining agent against continuity in collective bargaining, the Board decided to allow the second application. Any other result was rejected as unfair and unduly technical, given the reason why the first application failed.

19. In *Calvin W. Goldbeck*, [1978] OLRB Rep. June 543, counsel for the applicant, unaware that his client bore the burden of proving that a termination petition was voluntary, failed to adduce any evidence. Calling this error an innocent oversight, the Board once again chose employee free choice over stable labour relations. The same result was reached in analogous circumstances in *Soo Dairies Limited*, [1971] OLRB Rep. July 439.

20. These three cases might be taken to establish the proposition that a second application is not barred when the first fails on some "technical" ground or is aborted by an "innocent error". But this analysis runs head on into cases like *Filey Hall Paper Box Co.*, and *Windsor Lumber Co.*, *supra*, in which the Board imposed a bar. Why is filing stale cards, rather than the fresh ones on hand, any less of an "innocent error" than failing to call a petitioner as a witness? And how is the rule that cards signed before a union is formed are invalid any less "technical" than the rule that fixes a common application date for two raiding unions? The answers to these questions are not obvious. The difference in outcome between the cases that have allowed a second application and those that have not might be explained on a different footing. In both lines of cases, the wishes of employees had not been tested in an election and a reasonable opportunity for collective bargaining had not yet elapsed. These two lines of authority assign differing relative weights to the competing policy objectives of employee free choice and continuity in collective bargaining.

21. In the absence of any other considerations, we would balance these conflicting goals by refusing to entertain the second application in the case at hand. As the evidence called by the first applicant did not demonstrate that the petition was a voluntary expression of those who signed it, that application was dismissed without directly testing the wishes of employees. Employee free choice would be served by allowing a second application. But to permit another challenge to the union's bargaining authority would be to seriously impede negotiations for a new contract to the detriment of those who favour collective bargaining.

22. Counsel for the group of employees urged us to consider, along with the issues already discussed, another factor never before addressed in the Board's jurisprudence – the manner in which the union has represented employees in the bargaining unit. The alleged facts upon which this argument rests are set out above; counsel contended that these facts if proven would establish a violation of section 68 of the Act by the union. The gist of the argument was that a collective bargaining relationship between an employer and a union which has contravened the duty of fair representation is not worthy of protection against repeated termination applications. Counsel did not seek a remedy under section 89 for a violation of section 68. Rather, we were asked to entertain the second termination application, because the union allegedly has not fulfilled its duty of fair representation.

23. No authority was cited in support of the contention that the stipulated facts amount to a contravention of section 68. A large part of the complaint is that employees who are not union members have been excluded from the union's decision-making processes. Both this

Board and the British Columbia Labour Relations Board have ruled that in certain circumstances this is not improper: see *Britnell*, [1974] OLRB Rep. May 275; *Esco Limited*, [1977] 2 Can. LRBR 564 (B.C.). However, we decline to rule upon the application of section 68 to the stipulated facts, because the existence of a violation would not alter the outcome of this case. The premise that a union has violated section 68 does not lead to the conclusion that a collective bargaining relationship should not be protected against repeated termination applications. The approach we prefer is to foster ongoing bargaining while also remedying the contravention. The legislature has given the Board a broad remedial mandate, set out in section 89 of the Act, to remedy unfair labour practices, including breaches of the duty of fair representation. Not only does section 89 give the Board ample power to rectify any violation, but a section 89 complaint poses less of a threat to ongoing collective bargaining than does a second termination proceeding. Such a complaint can be initiated at any time, unlike a termination application which can only be brought during the open season when negotiations are typically underway. In the case at hand, the alleged violation is a continuing one that began long before the current round of collective bargaining. Yet the applicant has never sought relief under section 89. For these reasons, even assuming there has been a violation, in exercising our discretion under 103(2)(i), we could not consider a contravention of section 68 without also taking into account the availability of a section 89 remedy. Weighing both of these factors along with those discussed earlier, we decline to entertain the application before us.

24. Counsel for the applicant contended the Board should have imposed a bar in the decision dismissing the first application, and that the failure to do so precluded a subsequent refusal to entertain a second application. This contention misconstrues the breadth of the discretion created by section 103(2)(i). The Board is authorized to either “bar an unsuccessful applicant” prospectively when dismissing a first application or to “refuse to entertain a second application” when it is made.

25. Counsel for the employer argued that a refusal to entertain this application would infringe upon the employees’ freedom of association and so contravene the Charter of Rights. We do not accept that the freedom of association entails the freedom to terminate a union’s bargaining rights. But even if we did, we are not convinced that by refusing to entertain this application we are doing other than implementing a limit prescribed by law that is demonstrably justified in a free and democratic society.

26. Decision of Board Member J.A. Ronson will follow shortly.

1315-83-U Retail, Wholesale and Department Store Union, AFL:CIO:CLC, Complainant, v. Maple Leaf Taxi Company Ltd., Respondent

Duty to Bargain in Good Faith – Unfair Labour Practice – Union Security – Employer claiming no employees in face of Board decisions holding that persons “employees” – Employer making extensive demands but giving little – Bad faith bargaining in circumstances – Board finding check-off duty in s.43 applying re dependent contractors despite absence of “wages” flowing from employer

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members R. J. Swenor and P. J. O’Keeffe.

APPEARANCES: *Gordon D. Reekie and Bert Scott for the applicant; Louis Pasialis, G. Kermaris and C. Bokolias for the respondent.*

DECISION OF CORINNE F. MURRAY, VICE-CHAIRMAN, AND BOARD MEMBER P. J. O’KEEFFE; December 5, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent has contravened sections 15 and 43 of the Act.
2. There is no significant dispute on the facts. The complainant is the successor to the bargaining rights, privileges and duties held by the Ontario Taxi Association, Local 1688-CLC (hereinafter “CLC”). The CLC was certified by decision of the Board on January 12, 1982 as bargaining agent for:

All owner-operators and drivers employed by Maple Leaf Taxi Company at Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, multiple operators, dispatchers, and office staff.

In view of the nature of the respondent’s defense to the current charges, it is necessary to refer to paragraph 3 of the certification decision. This shows that while, initially, the parties were in “substantial” dispute as to the number and status of the individuals in the bargaining unit, ultimately the parties agreed to the above-described bargaining unit. Over 10 months after certification, the respondent applied for reconsideration of the certification decision on the basis that the agreement which formed the basis of that decision was made without the benefit of counsel and, therefore, the respondent could not have been aware of the “fine distinctions” of law and fact which would determine whether or not some or all of the bargaining unit were “independent contractors”. The reconsideration request was refused by decision dated October 29, 1982, (application for stay of proceedings dismissed by the Divisional Court December 16, 1982, cf. OLRB 1982-83 Annual Report pp. 59-6; application for judicial review withdrawn, April 1983). The Board in its extensive decision found that the respondent had been represented by legal counsel at the time it filed its Reply to the application for certification and that both in its Reply and through its submissions at the original hearing (October 30, 1981) the respondent’s legal counsel had accurately and comprehensively outlined the factual and legal issues which were raised by the application and which would have to be resolved by litigation, if no agreement was reached. The respondent’s Reply, reproduced in the Board’s decision on reconsideration, was as follows:

- “1. The persons for whom the Applicant seeks bargaining rights are not employees of the Respondent within the meaning of the Ontario Labour Relations Act. Rather, the Respondent submits these persons are independent businessmen with whom the Respondent cannot be said to have an employee/employer relationship.
2. Alternately, and apart from the above position, the Respondent submits the Board should not certify the Applicant as it would be an Employer dominated organization as prohibited by Section 13 of the Ontario Labour Relations Act, R.S.O. 1980, Chapter 228.
3. Additionally, the Board should not certify the Applicant due to serious misrepresentations made by the Applicant's collectors during the organization drive. Specifically, the Union's collectors misrepresented to these independent businessmen that the purpose of their organization was to lobby with Metro Toronto in an effort to increase taxi fares. At no time were these independent businessmen told the purpose of the Applicant's organization was to bargain collectively with the Respondent. In this respect, the Respondent submits any membership cards were signed under a false representation and therefore should be disregarded by the Board.
4. As the Respondent is not in an Employer/employee relationship with anyone, the Respondent submits there is no appropriate bargaining unit in the circumstances.
5. In an effort to aid the Board in this matter, the Respondent has enclosed a Schedule “A” listing persons whom the Respondent submits are Owner-Shareholders of the Respondent. Many of these persons employ drivers whom the Respondent has no knowledge of and is therefore not in a position to submit those names to the Board.”

In dealing with the reconsideration request the Board noted that as a result of this Reply:

9. ... the Board appointed a Labour Relations officer, and it might be noted, that appointment was expressly made without prejudice to the respondent's right to raise the various issues set out in its reply. Moreover, it appears that the respondent continued to be represented by counsel for at least some period of time following the Board decision [to appoint an officer]. Thereafter, it is said that the respondent was without counsel and that it entered an arrangement which was improvident. But there is no indication that the respondent made any effort to secure alternative legal advice at that time. On the contrary, on December 21, 1981, it decided to proceed, without counsel, and settle the substantive issues in dispute – in effect agreeing that a number of individuals whose status was disputed were indeed employees within the meaning of the Act. It was on the basis of that agreement that the Board issued its decision of January 12, 1982.

10. There was no hearing on January 12, 1982. No hearing was necessary. The parties had resolved the matters in dispute, had waived their right to a hearing, and indicated that they were content that the Board issue its decision on the basis of their agreement. Now, ten months later, the respondent seeks to resile from its earlier agreements and bring the matter on before the Board.

11. In proceedings before the Labour Relations Board parties are entitled, but not required, to be represented by lawyers. In the instant case, at the outset, the trade union was not represented by a solicitor and the respondent was represented by experienced labour relations counsel. Counsel on the respondent's behalf raised a number of issues of fact and law which would have to be resolved through litigation if the parties were unable to reach some accommodation short of that. But that is what they did, and we do not think it is now open to the respondent to repudiate its earlier agreement and litigate issues which had been formally resolved. There is no suggestion that the Board denied the respondent the opportunity to secure additional legal advice, nor is there any suggestion that the Board denied the respondent the right to a hearing on the issues which were raised in its reply. On the contrary, the appointment of a Labour Relations Officer was expressly made without prejudice to the respondent's right to do so. If the respondent chose to proceed without counsel to settle the issues in dispute between the parties, it did so at its own peril: moreover, it is a little difficult to understand why it let ten months go by before seeking reconsideration.

12. Nor is it easy to understand how individuals operating a business and possessing ordinary common sense could be under any illusion as to the nature and potential effect of their agreement. Despite the sometimes difficult determination of whether an individual is an "employee" or an "independent contractor" (a problem which the Legislature sought to simplify with the notion of a "dependent contractor" found in section 1(1)(h) of the Act) the certification process itself is relatively straightforward. In essence, it is a matter of determining whether a trade union enjoys majority support among a group of employees. The respondent initially claimed that the drivers were not employees but small businessmen. Later it conceded and agreed that certain of them were, indeed, employees. Once the respondent had agreed to the composition of that employee group it must have understood that a certificate would issue if the union could demonstrate the required support. And if there was any misapprehension in this regard why did the respondent wait for ten months before requesting reconsideration? Its second thoughts were rather long in surfacing.

13. The respondent may well have compromised its position in a manner which, in retrospect it considers imprudent, and had it continued to be represented by Mr. Wolfenden or sought other legal advice (as it was entitled and had the opportunity to do) it might not have agreed to settle its case. But it would make nonsense of the settlement process which the

Board, like the Courts, seeks to encourage, and it would be patently unfair to the applicant union if the matter were now re-opened. There are literally hundreds of cases before the Board every year which are either settled entirely or expeditiously resolved because of the parties' agreement on certain factual or legal issues. On the basis of such agreements, the Board typically issues a decision which is, by section 106 itself, expressed to be both final and binding for all purposes (see also section 108). To hold that these decisions should be reconsidered, months later, because a party asserts that he acted without adequate legal advice would substantially prejudice the private resolution of industrial disputes and contribute to an escalation of litigation. And, in this case, of course, the respondent was initially represented by experienced counsel who accurately and astutely put the respondent's position to the Board. It was the respondent itself which decided to proceed without counsel and compromise its stated position.

14. Section 106 gives the Board an extraordinary authority to reconsider its earlier decisions. But for the foregoing reasons we do not think this is an appropriate case for reconsideration. Nor is it necessary or appropriate to schedule a new hearing in this matter as requested by the respondent's new solicitors. The application for reconsideration is therefore dismissed.

3. Prior to the requested reconsideration, the respondent and the CLC on July 14, 1982 had entered into a collective agreement, the term of which was for one year from July 13, 1982. Sometime in early 1983, the complainant applied under section 62 of the Act for a declaration that it had acquired the rights, privileges and duties of the CLC. Formal notice of such application was given by the Board to all the interested parties (including the respondent) and no objections were raised to such application. Therefore, a declaration under section 62 was granted on March 14, 1983 (see Board File No. 2270-82-R).

4. On May 4, 1983, Bert Scott, Assistant to the Canadian Director of the Retail, Wholesale and Department Store Union, wrote on behalf of Local 1688 to the respondent giving official notice that it would be requesting amendments to the existing collective agreement and would be forwarding the amendments in the "near future". On June 6, 1983, the proposed amendments were forwarded by registered mail to George Keramaris, then President of the respondent. Simultaneously Mr. Scott suggested June 20, 21, 22, 23, 28 and 29 for the commencement of negotiations and requested that Mr. Keramaris contact him as soon as possible regarding such dates. Mr. Scott telephoned Mr. Keramaris on June 14th and left a message that Mr. Keramaris call him. Mr. Keramaris spoke with Mr. Scott by telephone shortly thereafter and indicated that he would call Mr. Scott at the beginning of the week of June 20, 1983 to set a time to commence negotiations. Mr. Keramaris testified that he questioned Mr. Scott as to the urgency for meetings to negotiate a new collective agreement in view of the fact that the current collective agreement had almost a month to run. When Mr. Scott did not receive a call back from Mr. Keramaris on June 20th, he called him on June 21st and left a message that Mr. Keramaris could reach him in his office. Mr. Scott never received a call or message from Mr. Keramaris and, therefore, he applied for conciliation on June 23rd. A conciliation meeting on July 27th was the first occasion upon which the parties met face

to face and the first time there was discussion between them regarding the amendments proposed by the applicant in June. It immediately became apparent that there was a threshold blockage to the negotiations. This blockage arose from the respondent's response to one of the proposed new provisions namely:

The Company agrees to collect as a condition of employment from each and every employee on the 1st day of each month and to remit to the union no later than the 8th day of each month, along with the employee's name, address and social insurance number, \$11.00 for union dues – effective July 1st, 1984 – \$12.00. It is understood and agreed that the employer shall only be required to remit those union dues actually paid to him, as per the constitution. The membership may increase these amounts and the employer agrees to deduct.

The applicant claims it proposed this amendment as a request pursuant to section 43 of the Act. Section 43 provides:

43.-(1) Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

(2) In subsection (1), "regular union dues" means,

- (a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade union in accordance with the constitution and by-laws of the trade union; and
- (b) in the case of an employee who is not a member of the trade union, the dues referred to in clause (a), excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union.

The respondent took the position in bargaining that section 43 cannot apply to any persons in the bargaining unit because none are "employees". The respondent claims that a portion of them are "shareholders" or "members" of the respondent because they are "brokers" (this segment of the bargaining unit will be referred to hereinafter as either "brokers" or "owner-operators"). The balance of those in the bargaining unit are drivers to whom the "brokers" rent their licenced cars (this segment of the bargaining unit will be referred to hereinafter as "drivers"). This rental fee is payable to the brokers. The respondent claims there is no connection between itself and these drivers. The complainant led evidence through one such driver which establishes that one of the respondent's officers did require that the driver's employment be authorized by the respondent and he was required to fill out a "form" that gave the respondent information about him which could be used in case of emergency.

No moneys are payable directly to them from the respondent. The respondent's evidence disclosed that the only money "brokers" receive from the respondent is through reimbursement for "coupons" or charge slips, which are the means by which some of the respondent's customers pay their fares. This fact was not contradicted by the complainant's evidence. The brokers pay the respondent a certain amount which presumably is that broker's share of the cost of dispatching and office services provided by the respondent. In some cases the brokers rent their taxis to drivers and the drivers pay a rental fee to the brokers in advance. All the moneys received by the brokers or drivers from customers would then be retained by the brokers or drivers, as the case may be.

5. The complainant's evidence regarding bargaining, aside from the respondent's position outlined above, establishes that the respondent wanted a number of clauses in the expired collective agreement removed, namely:

(1) ARTICLE 6

6.01 The money owed to the company by way of Maple Leaf charge accounts or other charge slips shall be paid by the company not more than 40 days after they have been submitted to the company.

(2) All of ARTICLE 7, i.e.,

7.01 *UNION MANAGEMENT COMMITTEE*

A labour/management committee shall be appointed consisting of equal representatives from the union and the employer. The committee shall meet at the request of either party for the purpose of discussing all matters of mutual concern.

7.02 The union and the company undertake that they will establish a Rules Committee and that no changes will be made which effect [sic] the working conditions of the members without the rules committee first negotiating the same. The Rules Committee aforesaid shall be made up of two representatives of the company and two representatives of the union.

(3) *ARTICLE 8 – GRIEVANCE PROCEDURE AND ARBITRATION*

8.03 *Step II*

If the reply to the grievance is not satisfactory to the grievor, then a meeting to discuss the grievance will take place within 5 (five) days of the receipt by the company. The grievor and a union representative and a company representative will be present at this meeting. Failure to resolve the grievance at this step may result in it being processed to arbitration.

- 8.06 Nothing in these rules and regulations shall deprive the members of the right to challenge a penalty through the regular grievance machinery.

(There appears to be no Article 9 in the collective agreement.)

(4) ARTICLE 10

10.01 (paragraphs 2 and 4)

In the event of any technological change the company shall notify the union not less than three months before the introduction of such changes.

The company further agrees that it will not impose any additional fee or otherwise as a result of technological change without first negotiating the same with the union.

(5) ARTICLE 11

- 11.03 The company agrees to acquaint new drivers with the fact that a collective agreement is in effect, and the company agrees to advise the new drivers as to the identity of the union representatives so that the new drivers may be advised of the terms and conditions as set out in this agreement.

- 11.05 Officers of the union shall be entitled to leave their work during working hours in order to carry out their function under the agreement including investigation and processing of grievances, attendance at meetings with management, participation in negotiations, conciliation, mediation and arbitration proceedings.

In addition, the respondent wanted a "Letter of Intent", which had been proposed by the complainant, inserted in the body of the collective agreement. The Letter of Intent was essentially a list of obligations of the complainant. The respondent also proposed a 1-year term for the collective agreement in response to the complainant's demand for a two-year term. The respondent also stated there should be no amendments to the collective agreement except those that the respondent itself suggested. The complainant felt that the respondent's position as a totality amounted to "all take and no give". It was conceded by the complainant that the respondent ultimately said it would "negotiate" Article 8 and Article 11.03 but, beyond this, the respondent's alternate position was never made clear to the complainant. It should be noted that the demands which the complainant delivered to the respondent on June 6, 1983, and which formed the basis of their negotiations included a mixture of Articles from the old collective agreement which were unchanged, together with those for which changes were proposed, and of proposals for additional Articles or terms. Notwithstanding the fact that the respondent was taking the position that it had no "employees" in the bargaining unit, there is no indication that it formally requested deletion of Article 2 - Union Recognition. In this connection, this panel asked both parties whether Article 2's bargaining-unit description changed the composition of the bargaining unit as described in the certificate. Both parties

said there was no change, notwithstanding the different language used in Article 2.01. Article 2 provides:

ARTICLE 2

2.01 UNION RECOGNITION

The company recognized that only those members who are licensed as taxi owners and drivers by the City of Toronto are members of the Union and excluding foremen, dispatchers, assistant dispatchers, mechanics, garage staff, office staff and other parties designated as management, the Company recognizes this union as the sole and exclusive bargaining agent for those members who are licensed as taxi owners and drivers by the City of Toronto.

Mr. Pasialis testified on behalf of the respondent that he and the other negotiators on behalf of the respondent, Messrs. Keramaris and Bokolias, interpreted the reference to “members” in Article 2 to mean members (i.e. brokers) of the respondent, not members of the union. Mr. Pasialis, who was secretary of the respondent both at the time of the certification and the signing of the old collective agreement, claimed not to have been aware that the certification meant that both owner-operators and drivers were considered employees. He said the certification was handled by a former President and that he did not discuss it with him.

6. The initial negotiating meeting held under the auspices of the conciliation officer on July 27, 1983, ended after approximately an hour and a half of communication through the conciliation officer. The complainant claimed that the respondent’s position of having no employees was a “hurdle” which was insurmountable that day and on August 24, 1983. The September 13, 1983 mediation meeting did not come about because of the failure of the complainant’s bargaining committee to attend on time. However, it is clear from the position taken by the respondent before us that the “hurdle” erected by the respondent’s claim to have no “employees” undoubtedly would not have been surmounted on that day either.

7. We have concluded that the respondent’s position that it has no “employees” amounts to a violation of its duty under section 15. Section 15 provides:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

The Board has on numerous occasions pointed out that the bargaining duty under this section has two broad connecting purposes when applied to an employer. The first purpose is that the employer has a duty to “recognize” the certified bargaining agent of its employees. The second purpose is to make all reasonable efforts to arrive at a collective agreement (see, for example, *De Vilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49 and *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397). Bargaining designed to undermine the trade union and avoid a continuing collective bargaining relationship is subject matter of the first purpose. The respondent’s position that there are no “employees” in the bargaining unit is a direct assault on the complainant’s bargaining rights and is a failure to recognize it as the bargaining

agent for persons in the bargaining unit set out in the certificate and the old collective agreement. We interpret this as a resurrection of the failed attempt, via its reconsideration application in October of 1982 and subsidiary court applications to retreat from the effects of its own agreement to the certificate issued by this Board. In view of the respondent's indication to us that the description of those in the bargaining unit in the certificate is essentially the same as the recognition clause of the collective agreement, there can be no doubt that its position in bargaining amounts to a denial of the certificate and that its alleged interpretation of the recognition clause as only covering "brokers" or "members" cannot be believed. Even if the respondent honestly held the belief that drivers "employed" by owner operators of the taxis were not covered by the collective agreement, it also took the position that the brokers were not employees. In view of the fact that only brokers appear to remain after "drivers" are eliminated from the unit, the unit would disappear. We are also not convinced that the respondent was simply rejecting the union's demand for check-off of dues pursuant to section 43 simply because of the lack of any "wages" payable from the respondent to the brokers. The respondent's bargaining position went deeper than that, i.e., to claiming that the brokers and the drivers had no status as employees notwithstanding the certificate. While it is true that the respondent did formulate a response to the complainant's demands, this represented an extensive gutting of the existing collective agreement and cannot be considered as evidence that the respondent's claim of having no employees was simply an answer given in the course of bargaining to the complainant's demand pursuant to section 43 of the Act.

8. With respect to the complainant's argument that the respondent's "all take and no give" demands amounted to a breach of section 15, we have concluded that the extensiveness of these demands, in conjunction with its position that there are no employees in the bargaining unit displays a lack of willingness to conclude a collective agreement. While it is true that the Board does not *normally* concern itself with the content of collective bargaining proposals when administering the duty to bargain in good faith, there are occasions when the content of bargaining proposals must be assessed. Thus, the Board has found that specific bargaining proposals constitute a breach of the duty to bargain in good faith because they are illegal or inconsistent with the Act's scheme (see, for example, *O.P.S.E.U. v. Cybermedix Ltd.*, [1981] OLRB Rep. Jan. 13; *Graphic Arts International Union and Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451), or because, even if lawful in other circumstances, they are being used to avoid reaching a collective agreement (see *United Steelworkers of America and Radio Shack*, [1979] OLRB Rep. Dec. 1220, application for judicial review dismissed (1980) 30 O.R. (2d) 29, 80 CLLC ¶14,017, (1980) 115 D.L.R. (3d) 197 and *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145). The respondent's proposals as a totality are an attempt to stymie the conclusion of a collective agreement. The effort seems to have been to throw up as many issues and road blocks as possible. These negotiations are not for a first contract, which could entail conflict over clauses which appear in a great number of other collective agreements. These are negotiations for a second collective agreement. The only difference in this second set of negotiations is that the employees in the bargaining unit have a new bargaining agent. It may be that the respondent saw this change as a fresh chance to negotiate a collective agreement which it could not achieve with the prior bargaining agent. If this is so, the respondent is under a misapprehension as to the effect of this change on its duty to bargain. Our assessment of the respondent's bargaining proposals in this context should not be construed as a finding which prohibits legitimate concession bargaining. There may well be instances where demands for concessions or deletions of clauses from the collective agreement are properly made. Each such case must be weighed on the particular facts and

we do not wish to be taken to be deciding prospectively that *all* such demands are breaches of section 15.

9. In connection with its section 43 demand, the complainant claims that both section 43 and section 15 have been breached by the respondent's refusal to agree to this demand (see paragraph 4 above). It is incontestable that if an employer refuses a legitimate demand pursuant to section 43, the employer can be found to have breached not only section 43 but also section 15. Section 43 was added to the Act in 1980 to remove a frequent stumbling block in collective bargaining negotiations. Its purpose was to put beyond any doubt the right of an authorized bargaining agent to receive, through the employer's control over an employee's remuneration, financial support from all the employees in the bargaining unit regardless of whether they are members of the union or not. "Check-off" ceased to be a bargainable issue. A bargaining agent need only make the request that a provision be included in a collective agreement requiring the employer to deduct from employees' wages amounts equivalent to regular union dues and to remit them to the bargaining agent and the employer cannot refuse such request. The facts of this case raise the question of whether a section 43 demand can be made in connection with dependent contractors or other employees who do not receive "wages" (as that word is normally understood) from the employer.

10. Section 43 was added to the Act five years after the Act had been amended to provide that "dependent contractors" were employees for the purposes of the Act (see, S.O. 1975, c. 76, s. 1(1) and S.O. 1980, c. 34, s.2(1)). The definition of "dependent contractor" in section 1(1)(h) contemplates that he performs work or services for "compensation or reward". This is a broad description of how this type of employee can be remunerated, and was intended to include economic or business relationships where payments for services do not fit the usual employee/employer paradigm, (see, for example, *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198 and cases cited therein) i.e., payments flowing directly from the employer to the employee performing such services. In view of the broadness of section 1(1)(h), can it be said that by using the word "wages" in section 43, the Legislature intended to have this obligation only arise when there are moneys physically flowing from the employer to the employee which can be identified as wages in the narrow sense and from which a deduction could be made? Put another way, did the Legislature intend to exclude from the benefits of section 43 those bargaining agents who represent dependent contractors who do not receive wages in the traditional sense?

11. There is no definition of "wages" in the Act. The Act makes varying references to moneys employees earn through their work. References to "wages" are found in section 46(1)(b), and section 79(1) and (2), while section 89(4)(c) refers to "compensation". Section 46 sanctions various provisions in collective agreements which could perhaps otherwise be found to be unfair labour practices by either the bargaining agent or the employer or both. One such provision sanctioned by section 46(1)(b) is one permitting employees to be absent from work to attend to union business without deduction of wages in respect to the time during which the employee is so occupied. Subsections (1) and (2) of section 79 establish the so-called "freeze periods" following notice to bargain and an application for certification. Both subsections forbid the alteration of "the rates of wages or any other term or condition of employment or any right, privilege or duty" of the parties until the specified procedures have been fulfilled. Section 89(4) outlines the orders the Board may grant where a contravention of the Act has been found. It is interesting to note that section 89(4) empowers the Board to

not only grant compensation but also "earnings or other benefits" lost as a result of the contravention. Therefore, in reviewing the Act as a whole, there is no discernible pattern of usage which would allow us to conclude that "wages" was used in section 43 to have meaning only in connection with employees who directly receive money from their employers.

12. As had already been stated, inclusion of section 43 in the Act was intended to remove a common bargaining obstacle and bestow a right on an authorized bargaining agent to utilize the employer's economic relationship with employees to ensure receipt of financial support from the whole bargaining unit (subject to provable religious objections) regardless of membership in the union. Section 43 is undoubtedly a remedial provision and, in accordance with the well-known canon of statutory construction, ought to receive a broad and expansive interpretation. If there could be any doubt, section 10 of the *Interpretation Act*, R.S.O. 1980, c. 219 provides that:

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In view of the fact that prior to the introduction of section 43 it was contemplated that dependent contractors could be employees for the purposes of the Act, and the fact that the rationale behind or the spirit of section 43 is equally applicable to a bargaining agent certified to represent these sorts of employees, we have chosen to interpret "wages" in an expansive way to include the compensation or reward which a dependent contractor can receive for his work or services. We can think of no reason why section 43 would be made inapplicable to "dependent contractors" or indeed any other person who fulfils the criteria of being an employee under the Act but who does not receive "wages" in the narrow sense. While an argument can be made that the employer cannot "deduct" from moneys that never pass through its hands, (in this case the fares are paid directly to bargaining unit members), it cannot prevail when it is recognized that this is an arrangement of a particular industry which allows for direct receipt by the employee of his remuneration from someone other than the employer. Under this arrangement the owner-operators/drivers pay in advance a monthly rate which entitles them to collect fares from customers and to keep them. This does not take away from the essential fact that they have access to these customers and are allowed to pocket these fares because of prior arrangements with the respondent. The situation could easily be one where the owner-operators/drivers collect the fares, return them to the employer, with the employer taking the appropriate share, and remitting to the owner-operators/drivers the balance. The employer could "deduct" dues in that situation. We are not persuaded that the existence of a different arrangement where there is a pre-payment of the monthly rate to the respondent, which permits the owner-operators/drivers to retain fares from customers, and the attendant necessity for the respondent to require additional money over and above this monthly fee from employees for union dues, changes the fact that the *source* of the dues is the employees. While we recognize that drivers do not directly pay the respondent their rental fees, there is nevertheless indirect payment via the owner-operators. In instances where there are drivers, the amounts paid to owner-operators would include their union dues and in turn the amounts paid to the respondent would include dues for both owner-operators and drivers. In those cases the

owner-operator is a conduit for the payment of union dues by the drivers. Therefore, we have concluded that section 43 is applicable to dependent contractors generally and to this bargaining unit in particular.

13. This does not mean, however, that we can conclude from the evidence that the complainants' proposal is necessarily an appropriately-worded demand under section 43. We note that the demanded language includes reference to both the employer "collecting" and "deducting". We have not been satisfied that this is a clear articulation of what is the nature of the employer's obligation. In view of this, we refrain from directing the respondent to approve the proposal as drafted. Nevertheless, we find that the respondent's position that it had no employees in the bargaining unit amounted to a failure to bargain in good faith and a failure to find appropriate language to fulfill its obligations under section 43.

14. In order to remedy these violations, we therefore order that the respondent:

- (1) cease and desist from taking the position that there are no employees in the bargaining unit;
- (2) cease and desist from refusing to negotiate an appropriate provision to respond to the complainants' demand pursuant to section 43;
- (3) commence bargaining forthwith and make every reasonable effort to conclude a collective agreement with the complainant.

15. In view of the fact that section 43 presents, in these circumstances, potential bargaining difficulties in the formulation of appropriate language, the parties may wish to have the assistance of a Labour Relations Officer for this limited purpose. Upon request of either party, an Officer will be made available.

DECISION OF BOARD MEMBER R. J. SWENOR;

1. I can see that the peculiar nature of the bargaining unit and employer/employee relationship in this case will lead to difficulties in collective bargaining for an acceptable and workable agreement.

2. However, I must agree with the majority position that the respondent cannot, in the face of the Board's previous decisions regarding certification, continue to take the position that there are no employees in the bargaining unit without breaching section 15 of the Act.

3. I must therefore agree with the remedies included in (1) and (3) of paragraph 14 of the majority decision. I cannot agree with the order contained in paragraph 14(2) and paragraph 15. I would find that there is no contravention of section 43 for the following reasons.

4. The proposed amendment by the complainant was not an appropriately worded demand under section 43 since it called for the employer to "collect" dues from employees. Section 43 provides for mandatory acceptance of a provision "requiring the employer to deduct from the wages of each employee ... union dues". In this situation, there are no wages. In fact, remuneration all flows the opposite way with owners paying the respondent a monthly

service fee, drivers paying owners a weekly "rental" fee, and fares being paid to and retained by drivers.

5. I am not necessarily concluding that dependent contractors should be excluded by section 43 simply because they do not receive "wages" defined in a narrow sense. It may be appropriate to find section 43 should apply where dependent contractors receive payments for their services from the employer which are not "wages" in the usual sense of the word. This, however, does not happen in this situation. The only monies passed "downward" by the respondent are reimbursement for "chits" used by some fares. I liken this more to cheque cashing than payment for services.

6. While I do not wish to review the earlier Board decisions regarding certification in detail, it is clear from the facts brought out in those proceedings that the complainant and its predecessor were aware of the monetary arrangements involved in the respondent's business and there is no evidence that check-off provisions were even contemplated let alone that they represented a stumbling block in the first collective agreement. We do not have here a situation where the respondent concocted an artificial system to avoid the provisions of section 43.

7. I believe we cannot give section 43 such a broad expansive interpretation as to require employers to go out and collect union dues in cases where there are no "wages", defined in the broad sense, from which to deduct.

1622-83-M Resilient Floorworkers, Local Union 2965, Applicant, v. Perfection Rug Co. Ltd., Respondent

Arbitration – Construction Industry Grievance – Practice and Procedure – Union referring grievance claiming grievance settled – Claiming Board has no jurisdiction to hear grievance – Requesting finding of settlement and order for compliance – Board giving union choice between pursuing original grievance on merits or withdrawing and filing new grievance – Considering authority to enforce settlements of grievances

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and F. W. Murray.

APPEARANCES: *Lewis Gottheil, Harry Hinton, John Kouba and Tony DiCarlo for the applicant; C. E. Humphrey and Andre Houle for the respondent.*

DECISION OF THE BOARD; December 12, 1983

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*. The relevant sub-sections of section 124 read as follows:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

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(2) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

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2. The application was made October 18th, 1983. On October 20th, the Board notified the parties in the customary form that a hearing would be held into the application on November 1st, 1983 and, in the interim, a Board Officer was named to confer with the parties and endeavour to settle the matter in dispute. The November 1st hearing was adjourned by consent of the parties and rescheduled for November 23rd. On November 21st, counsel for

the applicant addressed a letter to counsel for the respondent with respect to that hearing which contained the following statement:

“... the union will be taking the position in this ... case that the Board no longer has jurisdiction to arbitrate the grievance on the merits because the grievance has been settled by the parties. The union will, accordingly, ask the Board to enforce the settlement ...”.

The matter was raised at the hearing by applicant counsel as a preliminary issue going to the question of whether the Board had jurisdiction to hear the grievance. Accordingly, the Board heard the submissions of the parties on the preliminary issue.

3. The parties agreed that they were bound to the provisions of the Carpenter's Provincial Agreement and that the subject matter of the grievance arises thereunder. The grievance alleges the improper lay-off and unjust discharge of Tony DiCarlo from employment with the respondent. The position of the respondent put forward by its counsel at the hearing was that the matter had not been settled and the Board was properly seized with the grievance and had jurisdiction to hear it as filed. The applicant took the position stated in the letter; in other words, that the Board had no jurisdiction to hear the grievance on its merits because it had been settled. Notwithstanding the applicant's claim that the Board had no jurisdiction, however, the applicant wanted the Board to inquire into the fact of settlement and, if found, to issue a declaration and direction to the employer to comply with the terms of the settlement.

4. Respondent counsel argued that, where there is an issue of arbitrability, an arbitrator should decide only the question of whether there has been a settlement. If settlement has been achieved, the arbitrator has no jurisdiction to hear the grievance. Counsel pointed out that the respondent had not raised any question of arbitrability; on the contrary, it took the position that the Board is properly seized with the grievance because the respondent has not raised any challenge to the Board's jurisdiction. The respondent disputed the existence of a settlement and through its counsel argued that the question of settlement is irrelevant because the respondent has not challenged the Board's jurisdiction to hear the grievance. Counsel contended that, had there been settlement as the applicant alleges, the applicant should withdraw its grievance. On the other hand, if the applicant is not prepared to withdraw its grievance, it should proceed to have it arbitrated on its merits. By not doing either, counsel contended, the applicant is trying to have the Board determine for it what the applicant should do. In counsel's view, the applicant had a clear choice; either withdraw the grievance or proceed with it on its merits.

5. Respondent counsel, in support of the respondent's position, referred the Board to the decision of an adjudicator under the *Public Service Staff Relations Act: Re Mason and Treasury Board (Post Office Department)* (1981), 3 L.A.C. (3d) 117 (Norman). The adjudicator was confronted with a preliminary issue identical in nature to the issue herein; in other words, that the adjudicator no longer had jurisdiction to hear the grievance on its merits since it had been settled. The union had filed a grievance alleging the unjust rejection of a probationary employee. The hearing which had been scheduled for arbitrating the dispute was adjourned when the parties thought that they could settle it. The union later asked for the hearing to be rescheduled. When the grievance came before an adjudicator under section 91(1)(a) of the *Public Service Staff Relations Act*, the union asked the arbitrator to declare

that a settlement had been reached and to enforce the terms of settlement. Section 91(1)(a) of that Act reads as follows:

91(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

- (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award ... and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

The arbitrator reserved on the preliminary issue after hearing evidence with respect to the settlement attempts of the party, as a result of which the arbitrator had before him the uncontradicted evidence of the union that settlement had been achieved. After weighing the arguments of the parties, awards under the *Public Service Staff Relations Act* which had been referred to him by the parties and other relevant law, the arbitrator concluded that he had no authority under section 91(1)(a) of that Act to issue a declaration, binding or otherwise, with respect to settlement. He then considered whether he retained any jurisdiction under section 91(1)(a) or whether he should "... terminate [the grievor's] reference to adjudication." He decided, were he to follow the latter course of action, that the grievor would be left precisely where he was when he made the referral; without a job. The arbitrator rejected that course of action and concluded that he had jurisdiction to hear and decide the grievance as originally referred to him.

6. Applicant counsel argued that its request of the Board to hear evidence and representations on whether the grievance was settled simply raised the fundamental issue of the arbitrability of its grievance, a proper issue for an arbitrator to decide. According to counsel, proof of the alleged settlement goes to that question of arbitrability. He argued that the purpose of arbitrating disputes arising under a collective agreement is to make available to the disputing parties a speedy and effective resolution. If the parties settle prior to arbitration, either party should be able to make those settlements hold. Counsel argued that an arbitrator can achieve that objective, no matter which party has raised the issue of settlement, by determining whether settlement has been achieved in the course of deciding that fact as an issue going to the arbitrability of the grievance.

7. Applicant counsel, in support of the applicant's position, referred the Board to the award of the arbitrator in *Re The Ford Motor Company of Canada, Ltd.* (1952), 3 L.A.C. 1159 (Lang). The arbitrator in that case was dealing with a grievance, the subject matter of which was the failure of the employer to implement the terms of settlement made in an earlier grievance. The arbitrator made it clear that the grievance before him was not dealing with an appeal of the original grievance, rather it was a new grievance which raised "... the very important point as to whether the Company is bound by the foreman's decision on the original grievance, which decision was accepted by the grievors." The arbitrator went on to find that the subject matter of the first grievance was a proper subject for the grievance procedure and that the settlement of that grievance by the foreman in its preliminary stages was binding upon the employer regardless of the actual merits of the grievance.

8. The Board adjourned to consider the parties' submissions and the two arbitration awards on which each was relying. Having regard to those submissions and the principles

expressed in the two awards, the Board refused the applicant's preliminary motion and advised applicant counsel that he could elect to pursue the original grievance before the Board on its merits or he could withdraw the grievance and file a new one, the subject matter of which would be the respondent's failure to comply with the settlement it is alleged to have made with respect to the original grievance. The applicant asked leave of the Board to withdraw the grievance herein and advised the Board that it would file a fresh grievance alleging that the respondent had failed to comply with the terms of the alleged settlement of that grievance. In these circumstances, the Board consented to the withdrawal of the grievance.

9. In view of the nature of the submissions and authorities relied on by the parties, the Board, prior to making its oral ruling did not have before it the decision of the Board, differently constituted, in *Suss Woodcraft Ltd.*, [1983] OLRB Rep. April 600. This is a decision in which the Board directed the employer to comply with an oral settlement of a grievance. It is clear in that case that the Board was seized with the original grievance and there was no issue of the Board's jurisdiction in that respect. The applicant trade union prosecuted the original grievance and, in the course of establishing liability and quantum of damages for violation of the agreement, it relied on the evidence of the settlement it had reached with the employer. Therefore the Board in that case had before it the applicant's evidence of the employer's admission of liability for having violated the collective agreement, of their negotiations to resolve the matter and an oral settlement of the grievance.

10. The Board in *Suss* also had before it the awards of the arbitrators referred to in the decision, awards which were not before the Board in the instant case. It appears to have accepted the principle espoused in those awards that, where the settlement of a grievance is proven before the arbitrator, the arbitrator has jurisdiction to direct compliance, apparently in order to give effect to the final and binding resolution of the grievance referred.

11. The Board herein endorses the principle encompassed in the awards referred to the Board in *Suss*, *supra*, and by reference adopted by the Board. As well, this Board endorses the sound industrial relations purpose which is served by the Board's decision in *Suss* to direct compliance with the terms of the oral settlement; that is, the important purpose of supporting the settlement process at any stage of the grievance procedure. That purpose was recognized more than 30 years ago by the arbitrator in *Re Ford Motor Company*, *supra*. The fact that the source of his jurisdiction in that case was a fresh grievance alleging failure by the employer to implement the terms of settlement made in an earlier grievance detracts not at all from the importance which he attached to supporting the settlement process. He made abundantly clear the importance of the settlement process in any voluntary procedure for the final and binding resolution of grievances. In the course of reviewing the specific provisions of the grievance procedure in the collective agreement before him, the arbitrator expressed the following comments about the potential consequences of the employer not being bound by settlements made at any step of the procedure:

If the Company be not bound by the decision of the foreman, which is satisfactory to the employee, then neither is it bound by the satisfactory decision of the Superintendent or Personnel Manager, and any settlement reached at any stage of the grievance procedure may be repudiated by the Company. And the Company would be bound only by the decision of an Umpire. Surely that cannot be either the intention of the parties or a correct interpretation of the meaning or legal effect of the Agreement.

The purpose of grievance procedure is to effect a settlement of complaints of employees by peaceful means without recourse by the employees to strike action. If the company's argument be correct, then every grievance would necessarily have to be taken to the fourth or Umpire stage, in order to bind the Company. This would reduce the grievance procedure to a farce. *Moreover since an appeal can only be lodged by the emmployee in the event that the decision of the foreman, superintendent or personnel manager be unsatisfactory, the Company could, by continually refusing to be bound by the satisfactory answers of its officials nullify the grievance procedure.*

[emphasis added]

In finding that the employer was bound by the specific language of the collective agreement, the arbitrator commented further as follows:

This decision is based solely on a legal interpretation of the terms of the Agreement. But it it were decided only on the practical results of the case the conclusion would be unchanged because *I deem it much more important that grievances, once settled, in the course of grievance procedure, should be binding on both parties*, even though a practical difficulty be occasionally created by an incorrect settlement, than that all grievances should be carried to an Umpire or grievance procedure be scrapped or discredited, because practical difficulties can always be solved by the conscientious cooperation of the Company and Union officials.

[emphasis added]

12. Since, however, the Board's ruling in the instant case was made on the basis of the submissions and legal authorities placed before it at the time, the Board confirms its oral ruling and its consent for withdrawal of the grievance and the grievance is hereby withdrawn.

1764-83-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local 105 – London, Applicant, v. Premier Operating Corporation, Respondent

Bargaining Unit – Board confirming policy not to separate full-time and part-time employees in relation to craft units confirmed – Full-time and part-time projectionists included in single craft unit

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. G. Donnelly and F. S. Cooke.

APPEARANCES: *Alan L. Cowley, John C. Brady and Eric W. Drennan for the applicant; B. R. Baldwin, J. G. Knight and R. F. Friedland for the respondent.*

DECISION OF THE BOARD; December 8, 1983

1. This is an application for certification.

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3. The Registrar advised the applicant prior to the hearing in this matter that it will be required at the hearing to satisfy the Board that its organization is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. At the hearing in this matter, the respondent filed with the Board the constitution and by-laws of the applicant local trade union. Accordingly, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The applicant and the respondent have agreed that the appropriate bargaining unit in the present case is a bargaining unit consisting of all projectionists in the employ of the respondent at the Park Theatre and Mustang Drive-In Theatre in Goderich, Ontario, save and except manager projectionists, and those above the rank of manager projectionist. The respondent questioned whether the part-time employees in the present case should constitute a separate bargaining unit from the full-time projectionists. The Board's policy with respect to part-time bargaining units in relation to craft bargaining units such as the present application is stated in *Inland Publishing Co., Limited* [1969] OLRB Rep. 1341 where the Board stated:

“3. ...It is also not the usual policy of the Board to exclude ‘24 hour people’ or students from a craft unit. If such persons are employed and they are in fact craftsmen, then they are normally included in a craft unit. No arguments have been advanced by the respondent which in our view, would justify a departure from our usual policy in such matters. The case relied on by the respondent involving the present intervener and respondent did not involve a craft bargaining unit”.

Accordingly, having regard to the agreement of the parties the Board therefore finds that all projectionists in the employ of the respondent at the Park Theatre and Mustang Drive-In Theatre in Goderich, Ontario, save and except manager projectionists and those above the rank of manager projectionist, constitute a unit of employees appropriate for collective bargaining.

5. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 15, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. A certificate will issue to the applicant.

1259-83-U Susan G. Bartlett, Complainant, v. The Amalgamated Clothing and Textile Union, AFL, CIO, CLC, Shoe Division, Local 307, Respondent, v. **Savage Shoes Ltd.**, Intervener

Duty of Fair Representation – Remedies – Unfair Labour Practice – Union interpreting collective agreement as depriving grievor of seniority and recall rights – No reasonable explanation of how interpretation arrived at in face of clear language – Board finding arbitrariness – Directing filing of grievance including arbitration – Requiring union to post Board notice and mail copy to each employee – Discussion of duty as applying employee seniority rights

BEFORE: Owen V. Gray, Vice-Chairman.

APPEARANCES: *Leo Bartlett and Susan Bartlett for the complainant, Harold H. Fulker, Robert Barber, Maureen Byrne, Basil Gordon and Shona Barry for the respondent; Marc J. Somerville, Q.C. and F. W. Gobbo for the intervener.*

DECISION OF THE BOARD; December 12, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent union dealt with the complainant contrary to section 68 of the *Labour Relations Act* in that, through its President, the union “failed to recognize my accumulated seniority as per Article 16.05 of the collective agreement” and “failed to recognize my recall rights as per Article 16.07 of the collective agreement, therefore I was not permitted to return to work.”

2. As originally framed, Mrs. Bartlett’s complaint relied not only on section 68 but also on sections 69, 70, 72 and 3 of the Act. Reliance on sections 70, 72 and 3 was not seriously maintained by Mrs. Bartlett’s representative when it came to the argument of the case. Indeed, on the Board’s jurisprudence and on the evidence adduced, the complaint would not have succeeded to the extent it was based on those sections. However, having regard to the provisions of section 102 of the *Labour Relations Act*, the Board as presently constituted is unable to dispose of the complaint insofar as it relies on section 70, 72 and 3, and that aspect of the complaint will be treated as having been adjourned *sine die*. If section 69 has any application where, as here, hiring hall operations are not in question, then the reach of that section is, at best, no greater than that of section 68. In what follows, then, the respondent’s treatment of Mrs. Bartlett is examined to determine whether a violation of section 68 is made out.

I

3. The complainant, Susan Bartlett, was first hired by the intervener, Savage Shoes Ltd. ("Savage") on March 25, 1981. After working full-time for the company for seven months, she was laid off on October 23, 1981. The employer issued a Record of Employment on November 5, 1981 indicating that the reason for issuing the record was "shortage of work" and that the expected date of recall was "unknown". At the time of her layoff, Mrs. Bartlett was told by the plant superintendent, Kurt Bonstingle, that she would get some money if the lay off went beyond a certain point. She did receive a cheque at some time after her lay off. At that point in time she had no idea when, or whether, she would be recalled to work.

4. As it happens, Mrs. Bartlett went back to work on February 5, 1982 in response to a telephone call from Savage. She understood she was being asked to return to work because work was picking up. Two or three days after her return to work Alfie, her foreman, brought her a job application form and asked her to fill it out. She asked Alfie why this was necessary. Alfie told her it was for the office records. She filled out the form. Under the heading "Prior Employment History" she set out her previous period of work at Savage from March to October of 1981, and wrote "laid off" as her "Reason for Leaving". At some time after filling out this form, Mrs. Bartlett asked one or other of her shop stewards, Shona Barry and Maureen Byrne, why she was being treated as a "re-hire". The response she received in a brief conversation on the shop floor was to the effect that she had to start again because she had been laid off a certain number of weeks. Although she did not feel this gave her a clear picture of what was happening, she did not pursue the matter further at that point. Asked in cross-examination whether she had accepted the explanation given, Mrs. Bartlett said that at the time she did not know anything different from what she had been told. She was not happy with what she was told, but did not think there was anything she could do. It did not appear to her that the stewards thought there was anything she could do, either.

5. Mrs. Bartlett was laid off again in April, 1982. On April 14th, she was given a standard form letter dated April 8th, the first paragraph of which reads as follows:

"May this letter serve as notice of permanent lay-off (termination of employment) from the employment of Savage Shoes Limited."

This letter shows Mrs. Bartlett's last day worked as April 16, 1982. The Record of Employment later issued by Savage Shoes shows April 15th as the last day worked. "Shortage of work" is again given as the reason for issuing the record. The words "terminated probationary employee" appear as hand-written comments, and opposite "Expected date of recall" the employer has ticked off the box labelled "not returning".

6. Mrs. Bartlett did return on May 3, 1982 as a result of another telephone call from the company. After she had been back at work for two or three days, she was again asked to fill out a job application form. She filled it out, giving the "reason for leaving" in April 1982 as "laid off". She again questioned one or other of her job stewards about this procedure. They had nothing new to tell her, and she did not pursue her concerns further at that point. Shortly before she had been back at work for two months, the shop steward, Shona Barry, came and asked her to come to the front office. Kurt Bonstingle was there when she arrived. She was presented with a piece of paper which she was asked to sign. The document acknowledged her agreement to an extension of her probationary period by a further period

of one month. She was led to believe that if she did not sign she would be fired or laid off. She signed the document. Sometime after that, Mr. Bonstingle told her she was to be laid off again, but would be re-hired as of the end of the plant shutdown or vacation period. She was laid off July 9, 1982. The Record of Employment issued by the company on this occasion shows "shortage of work" as the reason for issuing the record, and "not returning" is checked off with respect to the expected date of recall. Mrs. Bartlett did return, however, on August 4, 1982 in accordance with her earlier discussion with Bonstingle. In due course she was presented with yet another application for employment. She filled it out, and in doing so set out the three previous periods of work at Savage, showing "laid off" as the reason for leaving in each case. On August 11, 1982, Mrs. Bartlett was laid off again, for the fourth time in less than a year.

7. Up to this point, Mrs. Bartlett had not reviewed the collective agreement between Savage Shoes Limited and the respondent union. She had previously asked for a copy, but had been told there was none. She admitted, however, that she had not gone so far as to specifically request of the stewards or the local union president that they make efforts to get her one. In any event, at this point Mrs. Bartlett went to a co-worker and borrowed her copy of what she called "the union book". The book in question is the collective agreement between the respondent union and Savage Shoes Limited made October 1, 1979 and covering the period from that date to September 30, 1982. She read the collective agreement, and found in it the following clauses:

16.01 A new hired employee will be considered probationary for the first two (2) months of employment and will have no seniority rights during that period. After two (2) months' service, the employee's seniority shall date back to the day on which the employment began. In individual circumstances the probation period may be extended by one (1) month if agreeable to the Union and the Company.

16.02 Unless otherwise specified, seniority as referred to in this agreement, shall mean length of continuous service in the employ of the Company.

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16.05 Employees who have been laid off due to lack of work and subsequently recalled to work will have their length of service determined by the actual time they have been on the Company's payroll provided such employees returned to work when notified and subject to the conditions in Clause 16.06 and 16.07 below.

16.06 Any employee who has been off the payroll for a continuous period of one (1) year or more will lose previously acquired seniority and will be rehired only as a new employee. In cases of lengthy absence due to illness, the one (1) year period may be extended by the mutual agreement of the parties to this contract.

16.07 An employee who has been laid off and still retains seniority and who is notified to return to work will lose seniority unless the employee

notifies the Company within three (3) working days (after receiving notice) that the employee intends to return to work, and unless the employee returns to work as soon as possible after receiving notice and in any event, within ten (10) working days after the mailing of such notice by registered mail to the last known address on the books of the Company.

16.08 An employee shall lose seniority standing if the employee voluntarily quits employment with the Company, is discharged for just cause and is not reinstated pursuant to the provisions of Article X or if absent from work without leave as provided in Article XIX, Clause 19.05, unless there is a reasonable justification for such absence.

Article 16.04 makes provision for lay-off of part-time and probationary employees before any full-time employee is laid off, and then goes on to deal with the bumping rights of employees with seniority where a lay-off goes so far as to affect them. After setting out a series of possible bumping routes for a displaced employee, Article 16.04 contains the following language:

16.04 Part 1

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(v) Any employee transferred under this clause will be transferred back to their former job as soon as their job becomes available, and the last employee transferred to a job in a lower classification shall be the first moved back to the job in the higher classification or in the case of lay-off, shall be the first employee recalled to their job, except in cases where the recall of the employee last laid off would require the Company to provide the employee with the training time of more than – Twenty (20) working days in Class 1, fifteen (15) working days in Class 2, ten (10) working days in Classes 3 and 4. ...

Mrs. Bartlett read Article 16.05 and 16.06 as providing that she still had seniority rights when she returned to work at Savage in February, 1982, since she had been laid off due to lack of work and subsequently recalled to work, and had not in the meantime been off the payroll for a continuous period of one year.

8. When she returned to the plant to pick up her last pay cheque in the latter part of August, 1982, she went to speak to shop steward Shona Barry, showed her the collective agreement and told her what she thought it meant. Ms. Barry took Mrs. Bartlett to see Maureen Byrne, the other steward in her section. Mrs. Bartlett showed them both what was in "the union book". She said she thought the union book meant that "you keep your seniority for a year". Barry and Byrne said she was not right. They went to get Bobby Barber, the local union president, to explain why.

9. Mrs. Bartlett met with Mr. Barber in an office in the front of the plant. She asked Mr. Barber about the provisions of the collective agreement. She said she understood them to provide that employees with seniority keep seniority for a year after they are laid off. According to Mrs. Bartlett, Mr. Barber told her that when the collective agreement had been

brought in "a lay-off was just a lay-off" and lay-offs were not classified as "temporary" or "permanent". Now, however, all lay-offs were either "permanent" or "temporary", and the clauses that she was reading in the collective agreement only applied to temporary lay-offs. As she had been permanently laid-off, she had not retained seniority. Mrs. Bartlett said she thought this amounted to breaking a written contract, and asked how that could be done. Mr. Barber said that it could be done, citing as his authority the union's business agent in London to whom he said he had just been talking that morning.

10. Mrs. Bartlett was not satisfied with Mr. Barber's explanation. She asked him for the name and telephone number of the business agent he had referred to. He refused to give it to her. He said there was nothing she could do. He had been talking to the business agent that day, and that is what he had been told.

11. During her meeting with Mr. Barber, Mrs. Bartlett had also raised some questions about deductions which had been made from her pay. In that respect Mr. Barber directed her to see Betty Cully, a Savage office employee who dealt with payroll matters. Betty Cully reviewed with Mrs. Bartlett her OHIP deductions. During the course of this review Mrs. Cully said "they" had taken union dues twice when "they" should not have. Cully said the union owed Mrs. Bartlett \$8.00 and that she would get a cheque for that. During this conversation Mrs. Cully called Mrs. Bartlett a troublemaker, and said that she was causing "a lot of trouble for the union and the company". Mrs. Bartlett never did receive a cheque refunding dues.

12. A couple of days after her meeting with Mr. Barber, Mrs. Bartlett spoke to Mr. Barber by telephone and again asked for the name and telephone number of the union business to whom he had referred in their earlier meeting. Mr. Barber again refused to provide her with that name. He again said there was nothing she could do and that she should drop it.

13. Except in connection with the question of her seniority, Mrs. Bartlett had not previously had any difficulty with the union. Prior to her meeting with Ms. Cully she had not been called a troublemaker by anyone. She thought there had been an occasion in the spring of 1982 when she had not been able to file a grievance because she was being treated as a probationary employee. She conceded, however, that the supposed inability of the union to deal with her grievance might have been a conclusion she had come to on her own, and not something she had been told by the union.

14. During cross-examination, Mrs. Bartlett was shown a document later identified as a list of employees laid off from the Cambridge plant of Savage during the fall of 1981. The list shows the seniority dates of each of the laid off employees, and Mrs. Bartlett appears to be the 22nd employee on the list if retirees are excluded. It was put to Mrs. Bartlett that on her interpretation of the collective agreement there were more than 20 employees who must have been improperly passed over when she was recalled to work in February 1982. Her response was simply that she did not know whether these people had been called and declined work or not. She was also asked whether she had attended any union meetings during the periods in which she had been at work at the Savage shoe plant in Cambridge. She said she had not.

15. Mrs. Bartlett was asked what she had done about her concerns between the time of the last of her conversations with Mr. Barber and September 2nd, 1983 when she filled out the Complaint in this matter. She said she had done nothing for quite some time, because

she thought she would eventually be called back to work by Savage as she had been on the three occasions in 1982. She felt she had a good work record and at first saw no reason to expect she would not be recalled. When she was not recalled, however, she began to wonder whether it had anything to do with the discussions she had had with Mr. Barber, or the statement Betty Cully had made that she was a troublemaker. She only found out about the possibility of an application to the Ontario Labour Relations Board at a later stage. It is not clear from the evidence when that was.

16. The respondent union called Robert Barber as its only witness. Mr. Barber is President of that local union. At the hearing he testified he had been president for "three or four years".

17. Mr. Barber recalled the meeting at which he said he had tried to explain to Mrs. Bartlett the difference between temporary and permanent lay-offs. He confirmed Mrs. Bartlett had asked for the name and telephone number of the business agent in London, and that he had refused to give Mrs. Bartlett that information. He explained he had done this because he had just been talking that day to the business agent, who had told him what temporary and permanent lay-offs meant. He felt he understood, and was "capable of handling it." He confirmed directing Mrs. Bartlett to Betty Cully on the question of the deductions. He denied having had a subsequent telephone call from Mrs. Bartlett. He felt Mrs. Bartlett had left the meeting satisfied with his explanation of the situation. Asked by the union representative whether Mrs. Bartlett had been the only employee "treated in this way", he said 50 to 75 employees had been "dealt with in this way".

18. It was Mr. Barber's understanding that a "permanent" lay-off resulted if the company did not recall an employee within thirteen weeks. The result was that the company had to pay severance pay. He felt "permanent means they no longer need you." He said his explanation to Mrs. Bartlett had been that the clause she was showing him was based on temporary lay-off, and would not apply to permanent lay-off. Mr. Barber was unable to identify anything in the collective agreement which made a distinction between permanent and temporary lay-offs.

19. Early in his cross-examination, Mr. Barber admitted not remembering too much about what went on in his meeting with Mrs. Bartlett. Asked whether any of the 50 to 75 employees to whom he had earlier referred had returned to work, he said some had and some had not. He could not say how many had or had not returned. Mr. Barber knew of the incident in which Mrs. Bartlett had been asked to execute a written consent to the extension of her probation period. He noted that the collective agreement provided for such extensions on the consent of the union, which he said had been given in Mrs. Bartlett's case because he thought the company would lay her off or fire her if the union's consent was not given.

20. With respect to Mrs. Bartlett's return to work in February of 1982, Mr. Barber was asked by the union representative in re-examination whether there had been employees with greater seniority who should have been recalled at that time. Mr. Barber responded that the union had been consulted about Mrs. Bartlett's initial recall in February, 1982, and had agreed to the recall of Mrs. Bartlett because she knew the particular job for which she was being recalled. If the company had recalled a more senior person, he said, it would have slowed the department down because that person would have required training. Mr. Barber did not

say whether, in his view, any employee with greater seniority had been entitled to recall at that time and in those circumstances.

21. Mr. Barber identified Basil Gordon as the business agent whose name and telephone number he had denied Mrs. Bartlett. Mr. Gordon was present throughout the hearing. He was not called to give evidence. The two shop stewards referred to in Mrs. Bartlett's testimony were also present throughout the hearing. They were not called to give evidence.

22. The intervener employer chose to call Frank Gobbo as a witness. Mr. Gobbo is the Vice-President of Personnel and Industrial Relations for Savage. He has been involved in industrial relations for Savage Shoes for 28 years and in collective bargaining with the respondent union since 1964, when it acquired its bargaining rights. He is responsible for the negotiation of collective agreements and other union relations matters for four Savage plants, including the Cambridge plant at which Mrs. Bartlett had worked.

23. Mr. Gobbo explained that in early 1981 there had been 250 to 275 hourly rated employees at the Cambridge plant. In the fall of 1981, Savage had to reduce the workforce due to competition and lack of sales. Although there had been fluctuations in employment levels in the past, this was the first time in 80 years that a workforce reduction had been so drastic as it was in the fall of 1981, when 55 to 65 employees were laid off. Mr. Gobbo said that Susan Bartlett was one of a number of employees to whom the company sent "permanent lay-off letters" in November 1981. Asked by his counsel what the words "permanent lay-off" signified, Mr. Gobbo replied that this had been the first time when this phrase had been used. He said the phrase "permanent lay-off" had been used rather than "termination" because it was "more explainable to Immigration and Employment". In re-direct Gobbo was asked about his familiarity with the provisions of the Employment Standards Act and Regulations thereunder. He said his understanding was that with a temporary lay-off if there is a recall within 13 weeks no severance pay or notice is required. If there is a permanent lay-off, the company has to give notice or severance pay. He went on to say that Mrs. Bartlett had received such severance pay in November, 1981, in the amount of \$191.60.

24. Mr. Gobbo identified the lay-off list shown earlier to Mrs. Bartlett. He confirmed it had been prepared on his instructions. The document has added to it in pencil a column headed "Date of Re-hire". Under this heading appear six pencilled dates opposite the names of six of the employees on the list. There is no notation opposite the name of Susan Bartlett. The company's explanation was that the secretary who prepared the document was instructed to note the dates of re-hire of any employees, other than Mrs. Bartlett, who had been rehired after the 1981 layoffs. Three of the six "re-hires" had less seniority when laid off than Mrs. Bartlett did at the time of her October, 1981 layoff. All of the six re-hires are shown as having occurred in the period between February 14 and August 9, 1983, in every case more than twelve months after the date on which the rehired employee had last been laid off.

25. Mr. Gobbo said he thought that Article 16 of the 1979-82 Collective Agreement did not deal with permanent lay-off. Asked to define "permanent", Mr. Gobbo said a permanent lay-off occurred when the company no longer had work for an employee and he is terminated from employment with Savage Shoes. In his questioning of Mr. Gobbo, the union's representative suggested that this approach was a "policy". Mr. Gobbo adopted that suggestion. The union's representative also suggested to Mr. Gobbo that this policy had been expressed during the negotiation of the 1979-82 collective agreement and earlier collective

agreements, and Mr. Gobbo adopted that suggestion as well. Mr. Gobbo also acknowledged, however, that "permanent lay-off" is nowhere referred to in the 1979-1982 collective agreement. He volunteered that the subsequent collective agreement contained new clauses making reference to "permanent lay-off". References to permanent lay-off in the new collective agreement, which came into effect October 1, 1982, include the following:

16.04 Part 2 RECALL AFTER PERMANENT LAY OFF (TERMINATION)

Recall rights will be granted to employees who have been laid off (terminated) due to a reduction in the work force for a period of one year from the time of termination notice.

Mr. Gobbo was asked in cross-examination what had given rise to the inclusion of this new provision in the current collective agreement. Mr. Gobbo's answer was evasive. He said that just as in any other set of negotiations, new clauses had been added and others deleted. He vehemently denied the suggestion that "Susan's case" was used as an example during negotiations.

II

26. Mrs. Bartlett's representative argued that the respondent union, through Mr. Barber, had failed in its duty to Mrs. Bartlett when Mr. Barber told her at that meeting of August, 1982, there was nothing she could do. Barber failed to explore the questions posed by her, or to consider the means available for resolving those questions. He failed to consider whether or how the provisions of the Employment Standards Act and Regulations could adversely affect employee rights under the collective agreement. He failed to give Mrs. Bartlett the name of the business agent, so that she could take the matter further. It was also argued that the union should have opposed the filling out of new application forms on the occasions when Mrs. Bartlett returned to work during 1982, and should not have agreed to the extension of Mrs. Bartlett's probation for an additional 30 days.

27. The respondent union argued that the company has control over hiring under clause 4.02 of the collective agreement, which reads as follows:

4.02 The Union further recognizes the right of the Company to operate and manage its business in all respects in accordance with its commitments and responsibilities. The location of the plant, the products to be manufactured, the right to move production work from one plant to another, the schedules of production, the methods, processes and means of manufacturing used, the right to decide on the number of employees needed by the Company at anytime, the right to use improved methods, machinery and equipment, and jurisdiction over all operations, buildings, machinery and tools, are solely and exclusively the responsibility of the Company. The Company also has the right to make and alter from time to time rules and regulations to be observed by the employees. Before making new rules and altering any rules or regulations, the Company will first discuss the rules with the Union and provide the Union with an opportunity to make representations on the proposed alternation to the rules,

and notice of new rules or rule changes will be posted in the plant to insure that employees are familiar with the rule. The foregoing enumeration is intended to illustrate, and not to limit the regular and customary function of management, all of which is maintained by the Company.

The union said this entitled the company to treat Mrs. Bartlett as it had.

28. The union noted that Mrs. Bartlett did not file a grievance on her own, despite Articles 6.02 and 8.01 of the collective agreement which it claims permitted her to do so without the intervention of the union. It emphasised that Mrs. Bartlett had failed to attend union meetings. It submitted that these two failures on her part disentitle her to relief. The union also argued that Article 16.02 of the agreement, which defines seniority as “length of continuous service in the employ of the Company”, contradicts Mrs. Bartlett’s interpretation of the collective agreement. Finally, the union said the evidence reveals an understanding between the company and the union which supports Barber’s views of the meaning of Article 16.

29. Counsel for the employer argued that there is nothing in the evidence to indicate that the union acted in an arbitrary, discriminatory or bad faith manner; the union simply did not agree with Mrs. Bartlett’s interpretation of the collective agreement and, accordingly, did not act on it. Assuming, without conceding, that the union’s interpretation was faulty, he argued that this resulted from mere negligence or innocent misunderstanding which falls short of the behaviour necessary to constitute a breach of section 68 of the Act, citing *Diamond “Z” Association* [1975] OLRB Rep. 791, *ITE Industries Ltd.*, [1980] OLRB Rep. 1001 and R. E. Brown, “The ‘Arbitrary’, ‘Discriminatory’ and ‘Bad Faith’ Tests Under The Duty of Fair Representation in Ontario“, [1982] Can. Bar Rev. 412. He suggested the evidence shows that Mrs. Bartlett was treated in the same manner as others, and in some respects better. In that regard, he noted that although she was 22nd on the seniority list, she was given work three times. He submitted that the union had properly addressed itself to Mrs. Bartlett’s concerns during the prolonged discussion between Mrs. Bartlett and Mr. Barber and, having done so, cannot be described as having acted in an arbitrary manner.

30. With respect to Mr. Barber’s denial of the name and telephone number of the business agent, counsel for the intervener questioned whether Mrs. Bartlett is entitled to a right of access to the business agent. He argued that it was reasonable for the local union president to deny such access, as the local trade union had an interest in “keeping dealings of this sort at the local level”. He said that Mrs. Bartlett could have found the telephone number for the union office in London on her own. He suggested Mrs. Bartlett engaged in “wilful blindness” in failing to do so.

31. Counsel for the intervener asked the Board to find that her failure to file a grievance herself disentitles Mrs. Bartlett from claiming that the union has breached its duty to her or, at least, supports an inference that she was satisfied with Mr. Barber’s explanation at the time she received it. In any event, counsel argued there was no prejudice to Mrs. Bartlett as a result of the behaviour of the union representatives. He asked what good a grievance would have done, and argued this is a question the union was entitled to ask itself.

III

32. Section 68 of the *Labour Relations Act* provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

33. Its status as exclusive bargaining agent gives a trade union the exclusive authority to negotiate and administer a collective agreement which establishes the terms and conditions of employment by which each employee in the bargaining unit is bound. The employees in any bargaining unit will have a wide range of interests. Because those interests will often vary and, occasionally, conflict directly, the trade union cannot fully accommodate or be expected to fully accommodate all those interests simultaneously, either at the bargaining table or in the administration of the collective agreement. The trade union is in each forum constantly obliged to make choices between competing interests of individuals, groups of employees and the bargaining unit as a whole, as well as of the trade union as an institution. Individually, no employee has direct control over the union's exercise of discretion in making these choices. The individual employee is prevented from bargaining on his own behalf with his employer. Such rights as the trade union may gain for him in bargaining will only have substance for him if a remedy for their breach is available. A remedy is ordinarily available only in a forum to which the trade union, and not the employee, has the right of access (*General Motors of Canada Ltd. vs. Burnet et al.*, [1977] 2 S.C.R. 537; 77 CLLC ¶14,067).

34. An employee for whom the costs of an adverse trade union decision outweigh the benefits can resign his employment, or join with a sufficient number of like minded co-workers in an application to terminate the trade union's bargaining rights. Apart from the protections of section 68, those are his only options if he wishes to avoid continued dissatisfaction. Neither option provides any retrospective remedy. The constitution of the trade union may provide for internal appeals or opportunities for redress of a political nature. The availability of such opportunities, however, is not expressly guaranteed by the *Labour Relations Act*, which does not set any particular standards for union constitutional democracy (see *Canada Trustco Mortgage Company*, [1976] OLRB Rep. Oct. 596).

35. In this context, an employee in a bargaining unit for which a trade union exercises exclusive bargaining rights has no reason to expect that his personal interests will always be fully served by the trade union. He does, however, have a legitimate expectation that choices made by the trade union, whether ultimately favourable or adverse to his personal interest, will at least be honest, fair and rationally responsive to interests and circumstances relevant to the decision. It is this employee interest to which section 68 is addressed.

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence

in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at his decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be “reasonable” (*Clifford Renaud*, [1976] OLRB Rep. Jan. 967, ¶22; *Jay Sussman*, [1976] OLRB Rep. July 349 ¶11; *I.T.E. Industries Limited* [1980] OLRB Rep. July 1001, ¶20), “not unreasonable” (*Ivan Pletikos* [1977] OLRB Rep. November 776, ¶3), “not open to challenge” (*Oil, Chemical & Automic Workers International Union and its Local 9-698*, [1972] OLRB May 521, ¶3), or at least “not implausible” (*Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union*, [1975] May 444, ¶32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers “patent” and arrives at an “almost perverse” understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from “directing its mind to the real question”, and that in so doing it has acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, ¶22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 623, ¶30; *Swing Stage Ltd. re Alvin Plummer*, [1983] OLRB Rep. Nov. 1920.

40. A determination whether the behaviour of a trade union official is arbitrary or not must be sensitive to the context within which and the persons by whom such decisions are normally made. These considerations are reflected in the following passage from the Board’s decision in *Canadian Union of Public Employees Local 1000*, *supra*:

25. In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other

interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent's particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word "perfunctory" and observed that a trade union "in a non arbitrary manner [must] make decisions as to the merits of particular grievances." It could be said that this description of the duty requires the exclusive bargaining agent to put "its mind" to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness. (See, for example, *The Steel Company of Canada, Limited* [1974] OLRB Mr.R. 392; *Rutherford's Dairy Limited* [1972] OLRB M.R. 423. See also Flynn and Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee* (1974) 8 Suffolk University, Rev. 1096, 1143; Clark, *The Duty of Fair Representation: A Theoretical Structure* [1973], 51 Tex. L. Rev. 1199, 1173.) The rationale of this consensus was canvassed by the board in *Ford Motor Company of Canada Limited* [1973] OLRB M.R. 519 at para. 40:

40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al* 8 D.L.R. (3d) at 521 at p. 546."

27. There is thus a concern not to engage in what may well constitute uninformed second guessing about a process of decision-making that resides at the heart of the administration of the collective agreement or to imposed unrealistic standards of conduct upon unpaid union officials who may lack the experience and time required to shoulder the burden. The

parties to a collective agreement are the most familiar with the problems that must inevitably arise and decisions have to be made “in a context of considerable conflict with delicate balance of mutual acceptability in a vortex of power, reason and persuasion”. (See Hanslowe, *Individual Rights in Collective Labour Relations* (1959) 45 Cornell L. Rev. 25, 46.) It is argued that a more stringent definition of the duty would discourage the union from settling grievances thereby clogging the lifeline of the collective agreement. Further, because in appropriate circumstances, an employer can be directed to respond to an alleged violation of the collective agreement which it may consider settled or withdrawn (and possibly time barred) too stringent a standard might introduce an unhealthy uncertainty that would discourage or penalize reasonable reliance on a trade union’s actions. In other words, it is felt that a more stringent standard would adversely affect the entire relationship between trade unions and employers to the detriment of all employees. Unfortunately, this limitation—one prevailing in the United States as well as in Ontario—necessarily leaves employees affected by mistakes and carelessness without a remedy under section [68]. And it is this result that caused at least one commentator to lament that until recovery for ordinary negligence is permitted “employees will always be second class citizens in their industrial world.” (Flynn and Higgins, *supra*, p. 1144). And while we must say this latter observation lacks a perspective and concern for the overall health of collective bargaining referred to above, it is symptomatic of a feeling some employees may experience in particular circumstances.

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section [68]. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances—errors consistent with a “non-caring” attitude—must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section [68] has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.

41. One of the themes of the passage just quoted is that the decisions which become subject to scrutiny under section 68 may be made by persons without legal training, persons whose experience in trade union matters may fall within a wide range. This must be taken into account both in the interpretation of section 68 and in its application to particular cases. This is not say that there is a different duty applied to different unions, depending on the

extent to which the union devotes time and money to matters of representation. The duty is the same for all unions. The standard of care is set with that fact in mind. In individual instances, however, the knowledge and experience of the trade union official whose decision is impugned will be relevant to an assessment whether his or her decision is arbitrary on the one hand or an honest mistake on the other. A mistake which might be the honest result of the reasoning processes of a volunteer new to the job (as in *Gina Ercegovic* [1975] OLRB Rep. Sept. 676, or *Jay Sussman*, *supra*) might be seen as the result of arbitrary conduct in an experienced full-time paid official who must be taken to know better. Lack of experience, however, will be a defence of limited utility where an official has available to him or her the assistance of more experienced officials. It must be recognized that the duty of fair representation is, in the end, a duty which applies to the trade union as an institution. Its requirements cannot be avoided by delegating decision-making to someone incapable of travelling a rational pathway from relevant considerations to reasonable result.

IV

42. Mrs. Bartlett's complaint to her union representatives was that her seniority rights had been ignored by the employer in its dealings with her subsequent to her October 1981 layoff. It is important to recognize the place seniority has in the spectrum of issues which may be faced by trade unions in collective bargaining and in the administration of the resulting collective agreement.

43. The administration of a collective agreement is influenced, at least ultimately, by the principles brought to bear by arbitrators who are regularly called upon to resolve contract disputes over seniority rights. Their approach is well summarized in the following often quoted passage from *Tung-Sol of Canada Ltd.*, (1965) L.A.C. 161 (Reville) at p. 162:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

44. In *Re United Automobile Workers Local 27 and Minnesota Mining and Manufacturing of Canada Ltd.* [1970] 21 L.A.C. 377 (O'Shea), a male employee had been laid off while two female probationary employees were retained. The male employee grieved, relying on a collective agreement provision requiring that probationary employees be the first laid off. The employer's defence was that its long-standing unchallenged practice had been to maintain two seniority lists, one for male employees and the other for female employees, and to lay off male employees only in accordance with their seniority relative to other male employees. It was in that context that the following observations were made at pp. 380 - 381:

The fact that this grievance is the first complaint made with respect to the company's long standing practice cannot prejudice the grievor's rights in this case, since the grievor has done nothing to lead the company into adopting this practice. *With the possible exception of the provisions fixing rates of pay, the seniority provisions of a collective agreement are the most important provisions contained in the agreement.* Seniority provisions usually afford an employee more protection and job security than any other provision of the agreement. *The seniority provisions are not for the benefit of the union but are for the benefit of each individual employee* and the provisions benefit the individual employee to the extent of the employee's own length of service in the bargaining unit. The seniority provisions should therefore be interpreted as individual rights rather than class rights. Once an employee's seniority rights are established under the terms of a collective agreement neither the company nor the union nor other employees can take those rights away during the lifetime of the agreement. At times of lay-off, the seniority of one employee in the bargaining unit is in contest with the seniority of other employees and the individual with the least amount of seniority suffers the lay-off. *Accordingly, if an employee's rights are clearly defined by the collective agreement, the fact that the union may have acquiesced in some company practice concerning the implementation of seniority rights cannot alter the rights of an employee which have been earned by the employee under the provisions of the collective agreement.* In the instant case, the fact that three senior male employees were on lay-off at the time the two female probationary employees were hired cannot affect the outcome of this grievance. It may well be that the three male employees were not aware that the jobs were vacant or perhaps they were not willing to perform the lower-rated jobs. However; that may be, the fact that they did not exercise their rights under the collective agreement does not prevent the grievor from exercising his rights.

If the parties to the agreement had wished to alter the manner in which the seniority provisions are to be applied, they could have done so by agreeing in writing to amend the seniority provisions of the collective agreement at any time during the term of the operation of the collective agreement. If they had done so, each employee would have been fully aware of what his rights then would be. This the parties have not done.

(emphasis added)

In *Re Canadian Union of Public Employees, Local 1, and Toronto Electric Commissioners* [1976] 19 L.A.C. 75, Arbitrator Arthurs observed at page 88:

Seniority provisions have been recently described in judicial language as a "charter of employment security", see *R. v. Arthur, Ex p. Port Arthur Shipbuilding Co.*, 62 D.L.R. (2d) 342 at p. 363, [1967] 2 O.R. 49 at p. 70 [revd 70 D.L.R. (2d) 693], per Laskin, J.A. The importance attached to these rights is demonstrated by the *Bradley* decision in which Laskin, J.A. (speaking for a unanimous Court), radically altered the previous

practice or arbitrators by giving a right of audience to employees who were adverse in interest to the union. He was dealing there with seniority rights as well, which he referred to as "personal benefits" and "substantive employment benefits", analogous to "property or contractual advantages" recognized by the common law as worthy of protection by natural justice requirements, see 63 D.L.R. (2d) 376 at pp. 381-2, [1967] 2 O.R. 311 at pp. 316-17. *There will be little dissent from the proposition that the seniority rights of employees are of extreme importance to them, and ought to be protected if at all possible.*"

(emphasis added)

45. Trade union collective bargaining decisions which have an adverse impact on the seniority or other job security rights of a minority of employees have been subjected to the closest scrutiny by Labour Boards: *B.C. Distillery Company Ltd.*, [1978] 1 Can. L.R.B. 375; *Dufferin Aggregates* [1982] OLRB Rep. Jan. 35; *Corporation of the City of Toronto* [1982] OLRB Rep. Jan. 124. In that context, the nature of seniority rights was explored by the British Columbia Labour Board in the following terms (*B.C. Distillery Company Ltd.*, *supra*, at pp. 381 - 382):

Legally speaking, the seniority rights of the employees rest on this contract which the Union has negotiated. These rights would terminate if the agreement were cancelled. And for that reason, a union may claim the same broad authority to revise the terms of this seniority provision as it enjoys in the negotiation of the general run of economic benefits.

But that claim rests on a superficial view of the nature of seniority as a social institution. The fact of the matter is that existing seniority clauses take on a much more compelling hue than other contract clauses. This is a good statement of the reasons why:

Seniority enables an employee to acquire valuable interests by his work, to capitalize his labour and obtain something more than a day's wages for his continued production. When seniority determines promotion rights, it gives the employee a claim to better jobs when they become available; when seniority determines the order of layoff, it provides the employee a measure of insurance against unemployment. Seniority does not guarantee that vacancies in higher rated jobs will be filled or that any jobs will be available; but by giving the senior employee priority when a choice is made as to who will be promoted or who will remain employed, seniority gives an employee an interest of substantial practical value. As Professor Aaron has pointed out, "more than any other provision of the collective agreement...seniority affects the economic security of the individual covered by its terms," and it has understandably come to be viewed as one of the most highly prized possessions of an employee. Seniority may be the most valuable capital asset of an employee of long service.

Summers and Love, "Work Sharing as an Alternative to Layoffs by Seniority", (1976), 124 U. of Pa. L.R. 893, at p. 902.

Employees in the plant know their position on the seniority list. They believe that they have earned that spot by their long service. They have firm expectations that that position will remain unaltered. Suppose then that the union and the employer negotiate a change in that clause, one which has the effect of re-shuffling positions on the seniority list. How does the adversely affected employee naturally perceive that contract change? He believes that the parties have simply taken a valuable asset belonging to him and given it to another employee. That perspective is most dramatic in a layoff situation in which the total number of jobs in the plant is reduced:

In a layoff situation, however, seniority takes on an importance of a wholly different order, for it determines who shall continue to work and who shall not. That determination necessarily carries with it all the other employment rights ordered by seniority—overtime, shift preferences, promotions, and the rest. In addition, layoff may jeopardize or destroy other valuable rights attached to employment or accumulated by long service. Layoff may result in termination of group medical or life insurance which the employee cannot afford to continue individually. If the layoff continues long enough to terminate seniority the employee may lose the longer vacations, accumulated sick leave, longevity pay, and perhaps even pension benefits, earned by length of service. When employees are confronted with mass layoffs, the symbolic and real importance of seniority is most compelling; deviation from the order of seniority is viewed as repudiation of "vested right". It deprives the senior employee not only of his security but of all other values he has earned by his length of service.

Summers and Love, pp. 904 – 905.

And for these pragmatic reasons, the law simply cannot take the attitude that because the union and the employer freely negotiated the original seniority clauses, they are also able to change that existing clause as well. As Professor Archibald Cox has said: "When established seniority rights are changed, the bargaining representative should be required to show some practical justification beyond the desire of the majority to share the job opportunities theretofore enjoyed by a smaller group." (Cox, *The Duty of Fair Representation*, (1957), 2 Villanova L.R. 151 at p.164).

This and other authorities led this Board to following conclusions in *Dufferin Aggregates, supra*:

28. The weight of authority supports the view put forward by counsel for the complainants that special considerations attach to any decision by a

union that alters or abrogates the job security of employees. That is especially true in relation to seniority rights. Seniority rights, built up over time, usually over a number of successive collective agreements, represent an employee's stake in critical interests such as promotion, pension rights and his rights of layoff and recall. The concept of seniority comes as close as any to approximating a form of industrial relations property right for the individual employee ...

46. In short, seniority rights have a special importance to trade unions and an often critical importance to the employees they represent. Arbitrators are quick to recognize this, and stand ready to protect such rights to every extent possible. A trade union may not lightly compromise the seniority rights of some to secure benefits for others. The employees it represents may fairly expect a trade union to resist any suggestion that the seniority rights they have won be abandoned, restructured or narrowly interpreted, particularly in the climate of uncertainty which prevails in hard times when lay-offs of significant numbers of employees have occurred or are projected.

47. With what was the union faced when, acting through Mr. Barber, it was called upon to respond to Mrs. Bartlett's concerns? There was no evidentiary difficulty, no problem of finding or assessing the credibility of witnesses. The facts were clear. Mrs. Bartlett had had seniority when she was laid off in October of 1981. No one had suggested or now suggests that that or any other subsequent layoff was a discharge for just cause. None of the things described in Articles 16.07 and 16.08 had occurred so as to cause her to lose seniority. She had been off the payroll for less than a year when she returned in February, 1982. Why should she not have started then with the seniority she had accumulated by the date of her layoff in October, 1981?

48. Mr. Barber's answer was that Mrs. Bartlett's "permanent layoff" sometime in November of 1981 had deprived her of the benefit of Article 16.05. He gave no explanation whatsoever of the basis of this interpretation. He knew of nothing in the agreement which required that so-called "permanent" lay-offs be treated differently from other lay-offs. As far as he was concerned, the distinction had arisen after the then applicable collective agreement had been negotiated. There was no suggestion that the parties had met and amended or agreed to amend the collective agreement at any time after it came into effect. We are left almost entirely in the dark as to how Mr. Barber decided on this interpretation. The only clue to his thought process is to be found in the fact that he referred to the *Employment Standards Act* and that the distinction he made between "permanent" and "temporary" lay-offs parallels the distinction in that Act. Can Mr. Barber's interpretation be explained by resort to the *Employment Standards Act*?

49. The relevant provisions of the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended, are as follows:

1. In this Act,...

(e) "employment standard" means a requirement imposed upon an employer in favour of an employee by this Act or the regulations.

4. (1) An employment standard shall be deemed a minimum requirement only.

(2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.

40. (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless he gives,

- (a) one week's notice in writing to the employee if his period of employment is less than two years;

• • • •

and such notice has expired.

(3) Subsections (1) and (2) do not apply to,

• • • •

- (b) an employee who is temporarily laid off, as defined in the regulations;

• • • •

Subsection (6) of section 40 obliges an employer who has given the required notice to an employee to continue the employee's wage benefits and conditions of employment unaltered during the notice period. Subsection (7) provides that where the employment of an employee is terminated without notice contrary to section 40, the employer must, *inter alia*, pay termination pay to the employee in an amount equal to his regular pay for the notice period. Section 65 of the Act authorizes the Lieutenant Governor in Council to make regulations:

• • • •

- (n) prescribing what constitutes termination of employment;

- (o) prescribing what constitutes "a definite term or task", "lay-off", "temporary lay-off", "indefinite lay-off", and a "period of employment".

• • • •

Regulation 286 under the *Employment Standards Act* is subtitled "Termination of Employment" and provides, *inter alia*, as follows:

1. For the purposes of Part XII of the Act,

(a) "temporary lay-off" means,

(i) a lay-off of not more than thirteen weeks in any period of twenty consecutive weeks,

• • • •

(b) "termination of employment" includes a lay-off of a person for a period longer than a temporary lay-off;

• • • •

9. - • • • •

(3) Notice of indefinite lay-off shall be deemed to be notice of termination of employment.

• • • •

50. It is not hard to see how Mr. Barber got the idea that the continuation of a lay-off for thirteen weeks or more had an effect on employees. The effect is that they become entitled to termination pay if they did not receive it (or appropriate notice) at the time of their lay-off. It is hard to see, however, how Barber could possibly have thought that the provision of this statutory benefit results in the truncation of collective agreement rights. It should seem as obvious to a layman as to a lawyer that legislation designed to improve the position of workers would not take away the benefits they had won in collective bargaining. That, indeed, is made quite clear in section 4 of the Act. Although it neither adds to nor detracts from the weight of this observation, it is interesting to note that the argument that receipt of statutory severance pay on an indefinite layoff precludes resort to collective agreement recall rights has been made and rejected (*Citation Industries Limited* (1983), 83 CLLC ¶16,027 (BCLRB)), as has the argument that the availability of recall rights while on indefinite lay-off precludes entitlement to termination pay under Employment Standards legislation (*Exolon Company*, Sprin-gate, Referee, unreported decision dated February 8, 1978; *Freightliner of Canada Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers, Local No. 14 and Employment Standards Board* 83 CLLC ¶14,019 (BCSC)).

51. Notwithstanding the total absence of any reference to permanent lay-offs or to the *Employment Standards Act* in the collective agreement, Mr. Barber thought that Article 16.05 did not apply to a "permanent lay-off". In Mr. Barber's view, any lay-off of more than thirteen weeks was a permanent lay-off. On that view, employees laid off for lack of work would necessarily lose previously acquired seniority if they remain off the payroll for more than 13 weeks. That is in direct contradiction to the clear language of Article 16.06, which expressly contemplates retention of seniority during layoffs of up to one year in duration. This makes it clear that "lay-off" as used in Article 16 cannot possibly be limited to "temporary lay-off" as defined by section 1(a) of Regulation 286 under the Employment Standards Act. Barber's persistence in his interpretation after Mrs. Bartlett drew his attention to Articles 16.05 and

16.06 suggests that Barber ignored either the Articles or the patent incongruity of his interpretation when juxtaposed with those Articles or, alternately, that he was influenced by some consideration not revealed by the evidence.

52. There was an attempt in the presentation of the evidence by the union and the company to suggest that Mr. Barber's interpretation, however unusual, had been in conformity with some past policy and had been consistently applied to employees other than Mrs. Bartlett. With respect to Mr. Gobbo's evidence in that regard, I am prepared to believe that the parties may for years have recognized a distinction between a lay-off for lack of work on the one hand and a discharge for cause on the other. That distinction is recognized in the collective agreement which was current at the time of the events giving rise to this complaint. I disbelieve Mr. Gobbo when he suggests the parties had previously recognized for collective agreement purposes a distinction between temporary lay-offs and permanent lay-offs, either in the negotiations which led to the 1979-82 collective agreement or in any prior negotiations. On Mr. Gobbo's own evidence, there had been no occasion on which that distinction would have become important prior to the lay-offs which occurred in the fall of 1981, after the collective agreement in question had been negotiated. I accept Mrs. Bartlett's evidence that in August, 1982 Barber told her that no distinction was made between temporary and permanent lay-offs when the 1979-82 agreement was negotiated. As to the suggestion that Mrs. Bartlett was one of a number of employees who had been "treated in the same way" by both the employer and the union, it is difficult to know what treatment the witnesses were referring to when they made these suggestions. Having considered the evidence carefully, I can only conclude that the treatment to which the witnesses referred was the treatment of employees at the time of the lay-offs in October and November of 1981. It was only at that stage that a large number of employees can be said to have received similar treatment. As noted in paragraph 24 of this decision, evidence introduced by the employer, and uncontradicted by the union, suggests that Mrs. Bartlett was the only one of the employees laid off in the fall of 1981 who was recalled to work within a twelve month period after her lay-off. On the evidence before me, I can only conclude that Mrs. Bartlett's was the first, if not the only, recall or rehiring in which the application of Article 16 of the collective agreement would have come into question. I have no difficulty accepting that the lay-offs would have been the subject of much discussion, both at union meetings and elsewhere. I have no difficulty believing that the distinction for *Employment Standards* purposes between temporary and permanent lay-offs might have been discussed on these occasions in relation to termination pay entitlement. It is not at all clear how the connection between the *Employment Standards* rights and the recall rights in the collective agreement would have come to be considered prior to the meeting between Mrs. Bartlett and Mr. Barber. If it had been, and if the conclusion Mr. Barber expressed at that meeting was a conclusion earlier reached, there is no explanation of the thought process by which he or anyone else had earlier achieved that result. There is no evidence that the business agent, Mr. Gordon, made that connection in his telephone discussion with Mr. Barber. If he did, there is no explanation of the mental process by which he did so.

53. The interpretation Mr. Barber says he adopted was disadvantageous not only to Mrs. Bartlett but to any other employees for whom some right of recall might have been asserted after their layoff stretched beyond 13 weeks. Far from excusing his treatment of Mrs. Bartlett, this observation adds to the gravity of the matter with which Mr. Barber was faced. Implicit in the company's treatment of Mrs. Bartlett was an interpretation of the collective agreement which had the potential of substantially and adversely affecting the rights of a number of employees represented by the union. In the result, the union, through Barber, acquiesced in that

interpretation. Except in the evidence of Gobbo recited and rejected above, there is no suggestion that the union was obliged to accept this interpretation as a result of any previous conduct on its part. There is no suggestion that some other employee or group of employees had competing interests which were advanced by the acceptance of the company's interpretation. The union does not say here that the rights of Mrs. Bartlett and those in positions similar to hers were sacrificed for the greater good of the bargaining unit. Had that suggestion been made, of course, the supposed advantages would have been subjected to the careful scrutiny mandated by such cases as *Dufferin Aggregates, supra*. The union was entitled, as the intervenor argues, to ask what good a (successful) grievance would do for Mrs. Bartlett. There is, however, no evidence that Barber considered that question at the time or that the answer would clearly preclude support for Mrs. Bartlett's interpretation of the agreement. Mr. Barber could not predict the future, and was in no position to say, in August of 1982, that recognition of her seniority would not do Mrs. Bartlett any good in the ensuing 12 months.

54. The Board recognizes that rational thought processes applied to appropriate materials by different people may lead to different results. The language of the Board in *Dufferin Aggregates, supra*, which deals with this issue in relation to a balancing of interests, is equally apt in considering the interpretation of collective agreements:

37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do what is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it – rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

I do not find the union's interpretation reasonable. The union now argues that Articles 4.02 and 16.02 support Barber's interpretation. That argument is unpersuasive and, equally importantly, there is no evidence that that argument or those Articles in any way influenced Barber when he made his decision. On the evidence before me, I am unable to find any process of reasoning leading from the materials Barber says he considered to the result at which he says he arrived. In coming to that conclusion I take into account Mr. Barber's length of service as president of the local union and I assume in his favour, although it was not brought out in evidence, that he is and was an unpaid part-time volunteer.

55. Section 68 of the *Labour Relations Act* does not grant any employee the absolute right to have his or her complaint taken by the union to arbitration or to any stage of the grievance procedure. This is so even if the subject matter of the complaint is of undeniable and fundamental importance to the grievor. Even where the complaint concerns an alleged

unjust discharge, the trade union is not obliged by section 68 to process the grievance through to arbitration regardless of its merits or the weight of competing interests. Its critical importance to the individual affected, however, establishes a discharge grievance as one which is entitled to serious consideration by the trade union. Where the possibility of obtaining a significant remedy in arbitration cannot be excluded on the evidence of the complainant, proof that a trade union has failed to process an unjust discharge grievance through to arbitration will impose on the trade union the burden of adducing persuasive evidence of the competing considerations it took into account in deciding to act as it did: *Alvin Plummer, supra*. Where the complaint is of a denial of seniority rights which affects or potentially affects the employee's right to available work, that complaint is also entitled to serious consideration by the trade union. Proof of the trade union's failure to pursue a complaint of this sort also casts upon it the burden of explaining the factors which led it to act as it did, so as to avoid the inference that that failure was arbitrary. That burden arose in this case, and the respondent trade union failed to discharge it.

56. The respondent argued that the collective agreement permitted Mrs. Bartlett to process a grievance on her own. Articles 6.02 and 8.01 of the collective agreement were referred to. It is apparent from those Articles that a grievance cannot be pursued to arbitration or even submitted in written form without the involvement of union representatives. Mrs. Bartlett can hardly be expected to suppose that a union representative would assist her in any significant way in the face of the opinion expressed by Mr. Barber and his refusal to give her access to the business agent. In any event, Mrs. Bartlett was entitled to rely on the respondent to represent her, and nothing in the collective agreement could relieve the respondent of its statutory duty to do so: *The Corporation of the County of Hastings, supra*, ¶23.

57. I conclude that in advising Mrs. Bartlett that she had lost her seniority rights before her "rehiring" in February of 1982 and that there was nothing she could do about her concerns, the respondent, through Mr. Barber, acted in an arbitrary fashion contrary to section 68 of the *Labour Relations Act*. I am reinforced in that conclusion by the fact that Mr. Barber refused to provide Mrs. Bartlett with the name and telephone number of the business agent to whom he referred in his conversation with her. I can only infer that he referred to that business agent in order to bolster the credibility of the advice he was giving Mrs. Bartlett. Having found it necessary to refer to the business agent, and having left the implication that someone more knowledgeable than he shared his interpretation of the agreement, his refusal to allow Mrs. Bartlett to check the accuracy of his report and to discuss the matter with the business agent cast doubt on the confidence which even Mr. Barber held in that opinion when he expressed it at the meeting. In addition, the refusal was itself arbitrary. Mr. Barber's only explanation for his refusal was that he felt he could handle Mrs. Bartlett's concern. He did not suggest he was acting in accordance with any internal union policy discouraging contact between bargaining unit members and the business agent. Nothing in the evidence suggested that there was any trade union interest which he thought out-weighed the interest of Mrs. Bartlett in pursuing her concerns with the Union's business agent.

58. By contrast I do not find any violation of section 68 prior to Mrs. Bartlett's meeting with Mr. Barber in August, 1982. There is no suggestion that the actions complained of were discriminatory or in bad faith. Mrs. Bartlett's contacts with the stewards over her treatment as a rehire seem more in the nature of perfunctory inquiries than serious complaints. She had just returned to work, she did not ask the stewards to pursue the matter with anyone, and made no attempt to do so herself. She did not at that stage complain, as she did in August,

that her rights had been violated. A trade union is not obliged to recast every unfocused concern or off-hand remark into a grievance under the collective agreement. That the stewards in question were capable of appropriate action is demonstrated by their immediate referral of Mrs. Bartlett to Mr. Barber once she had related her concerns to collective agreement rights.

59. The union's consent to extend what was then thought to be Mrs. Bartlett's probation period was not arbitrary. There was a reason for the union's decision to consent. The reason was rationally responsive to the circumstances and Mrs. Bartlett's interests. It appeared to the union, as it did to Mrs. Bartlett, that she would be fired if she did not remain probationary. On the then unchallenged assumption that she was a probationary employee, there was nothing the union could do to prevent the firing, except to consent, as did Mrs. Bartlett, to the extension of the probation period.

V

60. The respondent did not suggest that the complaint should be dismissed because of the complainant's delay in filing it. It did, however, suggest that the delay be treated as evidence that Mrs. Bartlett had been satisfied with the union's treatment after the incident of which she now complains. The trade union's expression of its concern has implicit in it the notion of prejudice, which is the factor considered by the Board in determining whether the delay in filing will, alone, lead to the dismissal of a complaint.

61. The *Labour Relations Act* does not impose a limitation period on the filing of complaints under section 89 of that Act. Section 89 does, however, leave it to the Board's discretion whether to entertain a complaint. The Board will exercise that discretion against the complainant if the delay is "extreme" and there are no mitigating factors which might justify or excuse the delay: *CCH Canadian Limited*, [1977] OLRB Rep. June 351; *Sheller-Globe*, [1982] OLRB Rep. Jan. 113 (judicial review denied; (1983) 42 O.R. (2d) 73); *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420; and, *Caravelle Foods* [1983] OLRB Rep. June 875. In assessing both the extremity of the delay and the existence of mitigating factors, the Board takes into account prejudice of two kinds: prejudice to the defense of the complaint and prejudice to the orderly conduct of the collective bargaining relationship between the union and the employer. With respect to mitigating factors, the Board does not penalise complainants for delay reasonably incurred in pursuing other avenues of redress prior to launching a section 68 application or for the time it may reasonably take for complainants to recognize the existence of a potential remedy under section 68: *Sheller-Globe*, *supra*, ¶15; *The Corporation of the City of Mississauga*, *supra* ¶22; *Caravelle Foods*, *supra*, ¶10.

62. Neither the respondent nor the intervener complained of having lost witnesses, destroyed documents or otherwise suffered any specific prejudice to its defense as a result of the delay. Having regard to the nature of the case and the length of the delay, it cannot be said that the delay must of necessity have unduly prejudiced the defense. As for prejudice to the collective bargaining relationship, a delay of 12 months in asserting a seniority claim may in some cases cause considerable prejudice. A successful claim for recognition of seniority rights can have a domino effect, as bumping rights are successively exercised by workers displaced as a result of recognition of the claimant's rights. This may be so even if there is no delay in asserting the claim. During any period of delay, other layoffs, recalls, promotions and transfers may take place in reliance on the view of seniority later challenged by a grievor.

This multiplies the number of adjustments which may become necessary to vindicate the grievor's view. In this context, a 12 month or even shorter delay might well lead the Board to exercise its discretion not to entertain a complaint that seniority rights have been ignored. Here, however, there was little evidence to establish what effect, if any, recognition of the complainant's seniority would have had on subsequent events. Indeed, there was some suggestion in the union's evidence that, on its view of the collective agreement, there might have been no difference to Mrs. Bartlett if her seniority had been recognized. While I am not particularly confident of the trade union's interpretation of its agreement and hence of its conclusions in this regard, I am not prepared to avoid or limit the inquiry into this complaint out of a concern which neither the respondent nor the intervener has expressed. In addition, there are mitigating factors. It was not unreasonable for Mrs. Bartlett to wait a while, at least, to see whether she would be recalled to work as she had in the past. As that prospect faded, it is not unusual that it took Mrs. Bartlett some time to resolve to take an adversarial position against the union and to discover her right to do so under the *Labour Relations Act*. In assessing tolerable limits on the delay involved in discovering and resolving to assert rights, the Board must take into account that while every bargaining unit employee is owed the section 68 duty, not every employee is aware of it. Indeed, the Board's experience is that the lawyers and other authorities to whom employees reasonably turn for advice are often unaware of section 68. The institutions most keenly aware of that section – trade unions – are less than anxious that awareness be improved. Not every employee thrives on controversy and confrontation. The availability of redress for violations of section 68 should not be limited to those who, by nature, are quick to discover and assert real and imagined rights. A twelve month delay may be more than can be accepted under this rationale alone, but in the circumstances of this case any unexplained portion of the delay is not "extreme" and does not warrant total denial of relief. The effect of delay on the appropriate remedy, and the nature of that remedy, remains to be determined.

VI

63. The object in fashioning any remedy under section 89 is to put the complainant so far as possible in the same position as if the Act had not been violated. It will nearly always be impossible to do so with mathematical precision, since the Board does not have the power to turn back the clock or expunge from the minds of the participants the experience of prosecuting or defending the complaint. The Board will not naively direct the trade union to do what it is just found the trade union failed to do, which is to devote thought of the appropriate quality to the complainant's problem and decide whether to pursue it. The prospective cost to the union of pursuing Mrs. Bartlett's complaint through the grievance procedure, to arbitration if necessary, is quite different now than it was at the time the union was first faced with the choice whether to do so. Now, success of the grievance will impose on the union liability to compensate Mrs. Bartlett for any loss she suffered through non-recognition of her seniority from the time the union breached section 68 to the time it turns its mind to the question of pursuing the grievance. Having been obliged to become the trade union's adversary in these proceedings, the complainant would be justifiably unimpressed with a remedy which afforded the trade union an opportunity to avoid that liability by conveniently concluding that her grievance should not be pursued having given apparent regard to all the appropriate factors. The appropriate remedy, therefore, is to direct that the union formulate and process the appropriate grievance. That direction would be of little value if the employer were to rely on the time limits set out in the collective agreement. The Board has the power to direct that the employer

and the union process grievances and submit them to arbitration notwithstanding the time limits set out in a collective agreement: *Ford Motor Company*, *supra*; *Imperial Tobacco Products*, [1974] OLRB Rep. July 418 and [1974] OLRB Rep. Sept. 606; *Leonard Murphy*, [1977] OLRB Rep. March 146; *Shafickool Mohammed*, [1977] OLRB Rep. April 216; *Reginald Walker*, [1980] OLRB Rep. Oct. 1651; *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338; and, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190.

64. The difficulty in this case is in determining what grievance the union and the employer should be directed to process through the grievance procedure and, if necessary, arbitrate. Had this case been heard and disposed of the day after Mrs. Bartlett's meeting with Mr. Barber, the Board would have directed that the grievance deal with failure of the company to recognize Mrs. Bartlett's seniority and to claim whatever relief might follow from the assertion of that seniority. Suppose at that point the employer had acknowledged, in principle, that Mrs. Bartlett had been entitled to carry forward her previously acquired plant seniority from the moment of her return in February, 1982. Having regard to the complex and not altogether clear bumping and recall provisions of Article 16.04 of the then current collective agreement, the parties would then have been obliged to analyze whether Mrs. Bartlett would have been less prone to layoff at any point up to and including the layoff of August, 1982. An assessment of the outcome of that analysis is impossible without hearing further evidence and argument. The evidence might establish that Mrs. Bartlett would have been laid off in August of 1982 even if her previously acquired seniority had been recognized at all material times. Mrs. Bartlett would then have been left only with the assurance that vigilant policing of the collective agreement by the trade union might result in her recall at some future date pursuant to the terms of the collective agreement then in place and, later, pursuant to the provisions of the collective agreement which succeeded it. Had no such rights arisen (or been discovered) in the twelve months following her August layoff, she would have lost the seniority rights at issue in these proceedings, either under the old collective agreement or under the new one. It is not beyond possibility that Mrs. Bartlett has suffered no real loss as a result of the union's breach of section 68. If, on the other hand, some set of circumstances did arise during the intervening period which would have entitled Mrs. Bartlett to recall on the basis of her previously acquired seniority, an arbitral remedy for the failure to recall her might well include a declaration that her seniority be calculated as though she had been properly recalled, with the result that the one year period referred to in Article 16.06 of both the old and the new collective agreements would have begun to run again only from the point, if any, at which she might have been laid off from the job to which she should have been recalled.

65. None of the parties is to be criticized for the fact that the Board does not have before it sufficient evidence to assess the range or complexity of the issues which might have to be dealt with in arbitrating any grievance which might now be filed on Mrs. Bartlett's behalf. The complainant could not be expected to know very much about what took place at Savage after she was laid off. The respondent and the intervener could be expected to know more. However, at the outset of the hearing counsel for the intervener inquired of the Board whether its participation would have to include a defense of the grievance on the merits. The Board drew counsel's attention to the fact that reference to arbitration was the usual remedy granted on a successful complaint under section 68 alleging failure to process a grievance, but that on the Board's jurisprudence the merits of the grievance would be relevant to an assessment of the union's conduct in failing to pursue it. The course taken by the respondent and the intervener in not leading evidence relevant to a remedy at arbitration is consistent with

those comments and with the Board's policy in dealing with section 68 complaints as outlined, for example, in *Shafickool Mohammed, supra*.

66. Some evidence did emerge which, if pursued, may establish that retrospective recognition of Mrs. Bartlett's claimed seniority rights would be more than a moot exercise. A person not previously employed by Savage was hired after Mrs. Bartlett's lay-off and prior to the hearing in this matter. While Mr. Barber claimed Mrs. Bartlett would require training in order to do the job for which the new employee was hired, he was unable to say how long that training would take. That information would appear to be relevant to an assessment of the applicability of the recall provisions of Article 16.04 referred to in paragraph 7 of this decision and the equivalent provisions in the new collective agreement. The evidence also disclosed at least three recalls of employees with less plant seniority than Mrs. Bartlett within the twelve month period after Mrs. Bartlett's layoff of August 1982. There was no evidence what those employees were recalled to do or whether the job or departmental seniority of those employees exceeded that of Mrs. Bartlett or whether Mrs. Bartlett could have been trained to do the jobs for which they were recalled within the time frame provided for in either the old or the new collective agreement. It may be that an advocate of Mrs. Bartlett's rights can persuade an arbitrator that she was entitled to be recalled to one of these, or other, jobs in preference to the employees who filled them.

67. In short, while resort now to the grievance process and, ultimately, arbitration raises potentially extensive factual issues relating to the ultimate remedy, the Board is unable to say that an effective and significant remedy would not be available to Mrs. Bartlett if she had recourse to the grievance procedure and, ultimately, arbitration.

68. While the Board is satisfied that Mrs. Bartlett's complaint should, if necessary, go to arbitration, this is not a case in which it is necessary or even desirable that the grievance procedure be by-passed. Indeed, intelligent resort to the grievance procedure by all of the parties may resolve the issues left unresolved by this decision. Even if full settlement is not possible, resort to the grievance procedure may at least assist the parties in narrowing the issues necessary to be dealt with at arbitration. The Board therefore directs that the union retain and instruct legal counsel approved by Mrs. Bartlett to forthwith draft and present a grievance with sufficient scope to take in all the defaults which flow from the company's failure from and after February, 1982, to recognize Mrs. Bartlett's previously acquired seniority, and to claim all such relief as may be required to remedy the consequences of each and every such default. The union is directed to file and process the grievance commencing at Step 2 of the grievance procedure outlined in its current collective agreement with the employer. The Board further directs that the employer receive and process the grievance commencing at Step 2 without objection concerning its timeliness or any other procedural deficiency arising from the delay. Both parties shall proceed on the basis that an arbitrator will have jurisdiction to consider and remedy any breach of the 1979-82 collective agreement or the current collective agreement.

69. In the event that the grievance is not settled to Mrs. Bartlett's satisfaction, the Board further directs that the grievance be processed to arbitration before a single arbitrator selected jointly by the company and the union and approved by Mrs. Bartlett. If the parties, including Mrs. Bartlett, are unable to agree on a single arbitrator within fifteen days after the completion of Step 3 of the grievance procedure, the trade union and employer are both hereby directed to request of the Minister of Labour that he appoint a single arbitrator to hear and determine

the grievance. The Board further directs that the union retain and instruct legal counsel approved by Mrs. Bartlett to represent it at the arbitration hearing and present and argue the grievance. Again, the company shall not raise any objection concerning timeliness or any other procedural deficiency arising from delay, and both parties shall proceed on the basis that the arbitrator has jurisdiction to consider and remedy any breach of the 1979-82 collective agreement or the current collective agreement.

70. Mrs. Bartlett's approval of union counsel or of the arbitrator shall not be unreasonably withheld, and, in the case of the arbitrator, shall not be necessary if the appointment is made by the Minister of Labour.

71. In the event Mrs. Bartlett becomes entitled to compensation as a result of an arbitration award or settlement, whatever portion is attributable to the delay caused by the union's breach of section 68 shall be paid by the union and that portion, if any, attributable to the complainant's delay in filing this complaint shall be foregone by the complainant.

72. The respondent union is further ordered to immediately post copies of the attached Notice marked "Appendix", duly signed by its authorized representative, on each and every of the bulletin boards in Savage's Cambridge plant which are ordinarily available to it for the posting of notices of union business. The respondent shall keep the notices posted for sixty consecutive working days, and shall take reasonable steps to ensure that the said notices are not altered, defaced or covered by any other material. If the union's use of such bulletin boards is subject to a requirement that Savage approve material the union proposes to post, then Savage is hereby ordered to forthwith give the required consent or approval to the posting provided for in this paragraph.

73. In addition to the posting provided for in the next preceding paragraph of this decision, the respondent is hereby ordered to mail one true copy of the duly executed Notice to each and every employee who is now or has at any time since October 1, 1981 been an employee at Savage's Cambridge plant in the bargaining unit represented by the respondent union. Each such copy shall be sent by prepaid ordinary mail addressed to the employee at his or her last known address. The copy shall not be accompanied by any other material. To assist the respondent in ascertaining the names and last known addresses of the employees to whom it is obliged to mail these Notices, the intervener Savage Shoes Limited is hereby ordered to make available to the respondent, and the respondent is hereby ordered to consult, the records maintained by Savage Shoes Limited pursuant to subparagraphs (i) and (ii) of section 11((1)(b) of the *Employment Standards Act*, R.S.O. 1980, c.137, as amended, which provide as follows:

11.(1) An employer shall

(b) make and keep in Ontario or in a place out of Ontario authorized by the Director for a period of five years after work is performed by an employee complete and accurate records in respect of the employee showing,

(i) the employee's name and address,

- (ii) the date of commencement of employment and the anniversary date thereof,...

74. The Board remains seized of this matter to resolve any dispute arising over the interpretation or implementation of the Board's orders and directions herein, including, without limiting the foregoing, any question of quantum arising out of the directions in paragraph 71.

[Notice to Employees Omitted] |

1338-83-R United Food and Commercial Workers International Union, Local 175, Applicant, v. **Silverstein's Bakery Limited**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Practice and Procedure – Subsisting collective agreement containing exclusion of “drivers” – Applicant union organizing only among employees whose primary function is driving – Employer and incumbent union establishing others treated as drivers and excluded – Applicant required to take all unless absence of community of interest established

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F.W. Murray and B. L. Armstrong.

APPEARANCES: *Harold Caley and Frank Kelly for the applicant; James Hassell and Dave Silverstein for the respondent; Orval Bartraw for the objectors.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; December 7, 1983

1. This is an application for certification in which the parties met with a Board officer on the date set for hearing and reached agreement on the following bargaining-unit description:

All employees of the respondent at Toronto save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.

The parties then agreed to the appointment of a Board officer to receive their evidence on, *inter alia*, whether certain persons were “persons covered by a subsisting collective agreement”.

2. When the parties subsequently met with the officer for the purpose of commencing the examination, however, it quickly became apparent that the parties were operating with two different views as to what “persons covered by a subsisting collective agreement” meant, and what, consequently, was the appropriate scope of relevant evidence before the officer. The

matter was accordingly put back on for hearing before the Board, and the submissions of the parties have now been received.

3. The applicant initially applied for a "tag-end" form of "all-employee" unit described as follows:

All employees of the respondent in its bakery at 195 McCaul St., Toronto, save and except office staff, persons covered under existing collective agreements, foremen, persons above the rank of foremen and persons regularly employed for not more than twenty-four hours per week.

The respondent has two collective agreements in force with Bakers' Union Local 181, which is not the present applicant. The first collective agreement covers the respondent's craft baking staff, and dates back several decades. The second agreement arose out of a 1981 application for certification, as a result of which the parties entered into a voluntary-recognition collective agreement covering, in broad terms, "production help". That collective agreement has since been renewed, and is described in its scope as:

ARTICLE I – RECOGNITION

1.01 The Employer voluntarily recognizes Local 181 as the bargaining agent for all employees of Silverstein's Bakery Limited, 195 McCaul Street, Toronto, Ontario who are not covered by a classification in the present agreement with Local 181, Toronto, Ontario, save and except foremen, foreladies, and drivers, and persons above the rank of foreman and foreladies and office and clerical employees.

The applicant claims that it relied on that scope clause to determine the existing unit, and organized on the basis of what was stated as the only relevant exclusion, being "drivers". It understood that term to mean those persons primarily engaged by the respondent to drive trucks, and who spend the bulk of their time on the road.

4. There are, as it turns out however, eight other persons whom the respondent asserts have, by agreement of itself and Bakers' Local 181, never been covered by the subsisting collective agreements: 6 of these individuals are described by the respondent as "shipper/drivers" or "receiver/drivers" and, according to the respondent, have driving included as a "regular", though not "primary", part of their duties. The other 2 are described by the respondent as "shipper" and "packager" respectively, and are said to act as drivers as required from time to time, although admittedly less frequently than the other six. The respondent argues that the Bakers' Union and itself have, for their own reasons, chosen to exclude all eight from the scope of the existing units, and that all eight have in fact been so excluded from the outset. The respondent argues that that is the simple reality of the situation, and that the applicant, or anyone else coming on the scene at this date, must take the situation as it finds it. Alternatively, if the Board is now going to seek to interpret the collective agreement, and in particular the word "drivers", it ought to treat that word as ambiguous and look at evidence of how the two parties to the collective agreement have interpreted that word in practice. The applicant, on the other hand, argues that it ought not to be bound by either the express agreement or the practice of the Bakers' Union. It argues that a collective agreement

must in circumstances such as these be interpreted according to its language, and if that language is clear, then a third party must be able to rely upon it. The applicant argues that this is the only way to provide clarity to an outside trade union arriving on the scene and focussing its resources on the body of employees which it will in fact be required to organize. The meaning to be given to the word “drivers” then, it argues, is an objective one, and should in fact be determined by the test of “primary” employment, in accordance with the approach of the Board, for example, in determining whether one construction trade or another is being employed on the date of an application, or with the approach of boards of arbitration generally. The applicant further requests leave to amend the description of the bargaining unit it seeks to “all retail and wholesale drivers of the respondent”, to more accurately reflect the unit which it had intended to organize all along.

5. The Board recognizes the benefit of clarity in these situations, and the difficulties which an organizing union may sometimes face in obtaining information which is complete and accurate. Nevertheless, the present case is not the only situation in which that arises. In the construction industry, for example, a trade union is aware that it must, in spite of the potential difficulty in gaining information, sufficiently identify the ongoing jobsites of an employer to meet the percentage levels required for a vote or certification. If it has misinformed itself, it must accept the consequences. The industrial context, it appears to us, at least offers a more limited scope for inquiry to an aspiring union, and the Board, in circumstances like the present, does not appear to have evolved a policy of anything less than requiring the trade union to take the situation as it finds it. If a trade union arrives late on a scene, in the sense that another trade union has already organized in the work place and entered into a collective agreement, the Board is not going to permit the new union to ignore, for example, the historical exclusion of a plant clerk, and litigate before the Board the issue of whether that clerk “ought” to be excluded as “office staff”, as it might if arriving on a fresh scene. Collective agreements tend not to be negotiated with third parties in mind, and there is nothing inherently sinister in two parties to the bargaining process agreeing, for their own reasons, that certain persons do not fall within the intended scope of their recognition or collective agreement. Those agreements by their recognition clauses may be more ambiguous or less ambiguous in a given case (noting, for example, the latent ambiguity in the word “drivers” on the facts of the present case), and it would be unrealistic to try to develop a policy of reliance by third parties based on whether their reading of the intended scope of two other parties’ collective agreement was a “fair” one or not. The only policy of the Board which offers any predictability at all is the normal requirement that a third party take the situation as it finds it, and an organizing trade union knows from that the kind of inquiries that it must endeavour to make.

6. None of the cases cited by the applicant deal with the situation where the employer and an incumbent trade union are *ad idem* that the individuals in question are *not* covered by the incumbent’s collective agreement, and the Board has great difficulty conceiving of an inquiry which would effectively be aimed at determining whether or not a given person is covered by a collective agreement, when both parties to that agreement have never been in doubt that the person is *not*. A determination by the Board in the applicant’s favour would, of course, not be binding upon the incumbent union, who has shown no interest in, apparently, representing these people, or in participating in these proceedings. The result of such a decision, therefore, would not be to place these people under the coverage of the subsisting agreement, but rather to simply leave them adrift between the two units. The creation of that kind of additional tag-end unit is not something to be accepted without further justification.

7. In that regard, the Board is prepared in the present circumstances to permit the applicant to amend the description of the bargaining unit it seeks. Given the degree of organizing at this work place, however, it will be for the applicant to satisfy the Board that the eight persons in dispute are sufficiently distinct in their community of interest to justify their exclusion from any bargaining unit which the applicant may at this stage be granted. The terms of appointment of the officer are accordingly altered to inquire into and report to the Board on the community of interest which the aforesaid eight persons said to be presently excluded from the subsisting collective agreements share with the group of drivers whom both parties agree are in the unit. The parties will, of course, have full latitude to call any evidence relevant to the issue of community of interest. The officer shall also receive evidence as to whether the eight persons in dispute have in fact, as the respondent states, been treated by the respondent and Local 181 as not covered by the subsisting collective agreements, should the parties be unable to agree on at least that factual issue.

8. The officer is at the same time instructed to carry on with his inquiry into the duties and responsibilities of those persons alleged to perform "managerial functions", which the applicant has now expanded to include:

Dominic Annechiaricco
Nizar Bhimji
John Nunes

DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. The applicant seeks to be certified to represent a unit of the respondent's employees who, it submits, are not currently covered by a collective agreement, excluding the office staff, part-time employees and students employed during the school vacation period. It ascertained which of the respondent's employees were not subject to a collective agreement by examining the scope clauses of the two collective agreements that are binding on the company. The production agreement, arrived at through voluntary recognition contains the following scope and recognition clause:

ARTICLE I - RECOGNITION

1.01 The Employer voluntarily recognizes Local 181 as the bargaining agent for *all employees of Silverstein's Bakery Limited*, 195 McCaul Street, Toronto, Ontario who are not covered by a classification in the present agreement with Local 181, Toronto, Ontario, *save and except* foremen, foreladies, and *drivers*, and persons above the rank of foreman and foreladies and office and clerical employees.

[emphasis added]

2. The applicant took the reasonable position that only the drivers and the other classification specifically mentioned in the provision were not subject to a collective agreement and therefore restricted its organizing efforts to that discreet group. The respondent now asserts that the collective agreement does not mean what it says, and that there are other employees, who are not employed or classified as "driver", but are employed as "shipper/

driver”, “receiver/driver”, “shipper” or “packager”, who are not covered by the collective agreement.

3. The collective agreement between the parties not only directly affects the incumbent union and the respondent but also affects its employees and third parties, such as the applicant. Because the collective agreement determines when a certification application is timely in respect of the employees bound by it, the term of the agreement must be certain so that third parties and employees will know when they can exercise their rights under the Act to make a representation application. Similarly, I believe that the scope and recognition clause of the agreement must be specific, as it is in this case, so that employees and third parties can rely on the words of the collective agreement when making an application for certification to the Board.

4. In my opinion, the words of the agreement are clear and the respondent is bound by them *for purposes of this application*. Only the respondent’s drivers and the office staff, etc., are specifically excluded from the current collective agreement. Therefore, the applicant should be permitted to apply for certification in respect of only drivers *without* being required to litigate whether the shipper/driver, receiver/driver, shipper or packager have a community of interest separate from the drivers.

5. I accept that the respondent might well, as its counsel has advised the Board, be able to establish that the employees in those classifications have *not* been covered by the agreement, notwithstanding the clear words which suggest otherwise. However, that determination should not prejudice the applicant in this case. If our finding that the drivers form an appropriate bargaining unit results in the employees in the other four classifications becoming eligible for representation by another trade union, with the possibility that the respondent will have to deal with four, rather than three, “production” bargaining units, that may be unfortunate, but it is not the fault of the applicant who, in organizing, relied on the clear words of the agreement.

6. If this Board were to permit parties to a collective agreement to assert in a certification proceeding that the scope and recognition clause of the agreement applies to employees who are not mentioned, or does not apply to employees who are mentioned, then it places third party unions and employees at a severe disadvantage when they seek to exercise their rights to terminate or change bargaining agents or become represented by a union for the first time.

7. I am of the view that employees and third parties place considerable reliance on the clear words contained in the scope and recognition clause of a collective agreement. This Board should encourage, rather than discourage such reliance. Therefore, when we are required to choose between reliance on a collective agreement and the possibility of undue fragmentation, we should select the former to encourage certainty and discourage parties to a collective agreement from entering into private arrangements which may place employees and other trade unions at a serious disadvantage should they attempt to exercise their rights under the Act to terminate the incumbent union’s bargaining rights, replace their union as bargaining

agent, or apply for certification, as in this case, because the employees are not currently represented by any trade union.

0715-83-M United Electrical, Radio and Machine Workers of America (UE) and its Local 513, Applicant, v. **Simmons Limited (Toronto Division)**, Respondent

Employee – Employee Reference – New position of Production Control Co-ordinator created – Occupant examined less than two months in job – Board satisfied position carried power of effective recommendation – Finding person excluded as managerial

BEFORE: M. G. Mitchnick, Vice-Chairman and Board Members I. M. Stamp and C. A. Ballentine.

APPEARANCES: *Art Jenkyn and Al Peters for the applicant; R. M. Parry and Al McCallum for the respondent.*

DECISION OF THE BOARD; December 19, 1983

1. This is an application under section 106(2) of the *Labour Relations Act*, requesting the Board to determine whether Margaret Campbell, the Production Control Co-ordinator, is an “employee” for the purposes of the Act.
2. The evidence establishes that the position under review is a new one, created by the company to tighten its control and monitoring of the efficiency performances of its operators. This function, to the extent that it was previously being performed at all, was performed by the company’s engineer, who is responsible for developing the standards initially, or the foremen of the individual departments. The company did not, however, find this method of control to be satisfactory, and posted the new job in June of this year. Ms. Campbell, the successful candidate, has her own desk and office, which is located between the offices of the engineer and the production supervisor (to whom the foremen report). The company took the position from the outset that the position was “managerial” and “confidential”, and the union immediately filed the present application with the Board. By the time Ms. Campbell was examined by the Board Officer, she had spent less than two months in the new job. The problem which this creates for the Board is that, as the union points out, it is clear that Ms. Campbell has no independent power on her own to make decisions with respect to the adjustment of standards or the imposition of discipline on employees. Her only power, if she has any, is that of “effective recommendation”, and as the Board noted in the *Corporation of the City of Barrie*, [1983] OLRB Rep. Aug. 1239 that test is the most difficult one for the Board to determine without some actual experience in the job as a guide.
3. The starting point for Ms. Campbell’s job is to receive from the foreman each day the production reports for the various operators. Ms. Campbell then enters these production figures on a master sheet and at the same time, where a standard has already been developed by the company, she calculates the percentage which the operator’s production represents of the standard. Were her job to stop there, it would be clear, as the union submits, that Ms.

Campbell is no more than an “analytical clerk”, having nothing of the kind of judgmental latitude which would place her in a conflict position and justify her exclusion from the bargaining unit as a “managerial” person. It may well be that, as the company continues with its program of developing standards for each job in the plant, there will be additional persons assisting Ms. Campbell whose job *will* be limited to this. Ms. Campbell’s own job, however, does not stop there. She is, as she says, expected to investigate on her own, through the foreman and employees concerned, the reasons for any persistent failure to make the standard, and to *satisfy herself as to whether she feels a problem exists*. If, after her own investigation, it is her judgment that some form of corrective action *is* required, a meeting takes place in her office with the production supervisor and the foreman concerned. To date, of the three meetings which Ms. Campbell herself has initiated, two of them have resulted in discipline for employees, and the third resulted in an immediate cutback of staff, in a case where Ms. Campbell ascertained that the number of employees actually employed in the department exceeded the number which manning requirements had called for. Ms. Campbell was asked, at page 50 of the report, whether “when you’ve recommended discipline, has it always gone through?”, and her answer was, “I would say yes”. This is consistent with the evidence of the Plant Manager, Mr. Drouin. Questions of discipline arise as well in regular production-standard meetings which Ms. Campbell attends but does not initiate, and in connection with this, she was asked: “Then in one case you said you recommended, they decided on discipline and you recommended against discipline and they didn’t put discipline in?”, and Ms. Campbell confirmed that that had been the case. Ms. Campbell also on her own came to the conclusion in analyzing the production reports of a particular individual that there was in fact something unfair in the standard developed for his job, and recommended that the standard be changed in his favour. That recommendation was adopted immediately.

4. Ms. Campbell, who was an extremely candid witness, made it clear that, since she was still being trained, she did not feel that she had yet reached the point of making the kind of extensive recommendations which she believed the job anticipated. On the other hand, she was asked by company counsel whether in her own view, her new job was one which properly belonged within the bargaining unit. Ms. Campbell responded that she did not feel that it did, and explained: “Well I do have access to personnel files, engineering standards and being involved in disciplines, layoffs and personally I feel I would be trying to straddle both sides of the fence”. These would be easy statements to make from someone who in fact was anxious to have the Board find that their job was “managerial”, but the interesting thing about Ms. Campbell is, as the transcript discloses early in her evidence, she was reluctant to apply for the new job because she was concerned about giving up the security which she felt goes with being a member of the union’s bargaining unit. Ms. Campbell was also actively involved as a union steward prior to her promotion. Her concern about the potential conflict in which her new job would place her appears, therefore, to be genuinely felt. The applicant’s response to this is that Ms. Campbell may believe that her job is one where such conflict will exist, but she has simply been “led down the garden path” by the company into believing that. The applicant argues, in other words, that Ms. Campbell’s understanding of the full expectations of her job bears no reality to the kind of job it really is.

5. On the basis of what has actually happened even at this early stage, however, the Board is unable to accept the applicant’s characterization of Ms. Campbell’s job. It is clear that she does have to make a decision as to whether to initiate action, and her decision to do so appears to consistently trigger an immediate management response. As the Board said in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121:

The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees.

It is clear that Ms. Campbell to date has exercised her judgment in a way that has not only prejudiced employees in the unit, but has also benefited them, and it appears to the Board that she will best be able to perform the role expected of her if she remains free of the kind of conflict, or apparent conflict, which placement within the unit would create. The Board does not, therefore, find the company's characterization of Ms. Campbell as "managerial" to be inflated, or premature, but rather finds that Ms. Campbell is not an "employee" for the purposes of the Act.

1678-83-U Leslie George Nagy, Complainant, v. United Steel Workers of America, Local 1005, and **Stelco Inc.**, Respondents

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Employee discharged in October, 1979 notified in February, 1982 that grievance withdrawn – Complaint filed in October, 1983 not entertained because of extreme delay – Settlement of grievance in course of contract negotiations not breach where merits considered by union

BEFORE: R. D. Howe, Vice-Chairman.

APPEARANCES: *Leslie George Nagy on his own behalf; C. M. Mitchell, R. Fleet, B. Greenaway, L. Taylor, E. Sutherland and J. Gillen for the respondent trade union; T. F. Storie, R. Lane and Joe Balogh for the respondent company.*

DECISION OF THE BOARD; December 8, 1983

1. The style of cause of this complaint is hereby amended to add "Stelco Inc." as a respondent.
2. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent trade union contrary to section 68 of the Act.
3. In his complaint, which was filed with the Board on October 25, 1983, the complainant alleges that following the termination of his employment in October of 1979 by the respondent Stelco Inc. (referred to in this decision as "Stelco" or the "company"), the respondent trade union (the "union") failed to refer his termination grievance to arbitration and properly protect his rights. In particular, he alleges that after he had been informed that his arbitration "would be heard on March 4, 1981", the arbitration was "cancelled without [his] consent". He further alleges that he was denied his "right" to go to arbitration "because

Stelco wanted all arbitrations cleared up before it would enter into a new agreement with Local 1005 in 1981.”

4. Since the events which form the subject matter of this complaint occurred more than a year before it was filed, the Board found it appropriate to call upon the complainant to show cause why the Board ought to exercise its discretion under section 89 of the *Labour Relations Act* to hear this complaint after the passage of such a lengthy period of time.

5. *In The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, the Board described its general approach to delay in cases of this type as follows:

20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it—including the employees—are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay—holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties’ current collective bargaining relationship—quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board’s view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reason for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both overriding public policy considerations, that limit should be measured in months rather than years.

See also the following recent decisions in which the Board adopted a similar approach: *Conestoga College of Applied Arts & Technology*, [1983] OLRB Rep. June 882; *Chrysler Canada Limited*, [1983] OLRB Rep. April 490; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446; and *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113. On June 28, 1983, an application for judicial review of the Board's decision in the *Sheller-Globe* case was dismissed by Divisional Court. In a unanimous judgment delivered by Osler J. (reported in 42 O.R. (2d) 73), the Court confirmed (at page 76) that the Board's "right to lay down its own procedure" includes the power to hold a show-cause hearing for the purpose of requiring a complainant to satisfy the Board regarding the question of delay before investigating the merits of the complaint.

6. See also *Caravelle Foods*, [1983] OLRB Rep. June 875 in which the Board wrote:

9. The Board has in previous cases described delay as being either "extreme" or "unreasonable". Extreme delay warrants a dismissal on preliminary motion. However, unreasonable delay impacts on the remedy but does not deny the complainants the opportunity to prove the violation of the Act. (See *CCH Canadian Limited* [1977] OLRB Rep. June 351.) Section 89(4) of the Act gives the Board discretion to decide whether it will inquire into an unresolved complaint. Section 72 of the Board's Rules of Procedure (fully set out below) requires that a complainant file allegations of wrongdoing "promptly" upon discovery of the wrongdoing. If, in the opinion of the Board, the allegations and particulars thereof have not been filed promptly, the Board may refuse to allow the evidence to be adduced or, alternatively, may only permit the evidence to be adduced upon specified terms or conditions. The Board has been, by and large, more willing to hear complaints than to refuse, using its remedial powers, to reduce the prejudicial effect of the complainants' delay on the respondent. The nature of delay is assessed not only on the basis of time elapsed but the effect on labour relations or a collective bargaining relationship if the complaint is entertained where there is no remedy to be

given or the remedy would be deleterious to the relationship. In *Sheller-Globe*, [1982] OLRB Rep. Jan. 113, the Board summarized the test in a section 68 complaint as follows, at paragraph 13:

... The Board has always been conscious of the need for expedition in its practice and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

The thread running through all the section 68 cases dealing with delay is a concern as to the effect of the process and/or the remedy on the collective-bargaining relationship. This is because the remedy sought has usually been a demand for arbitration or restoration of lost rights, not only for monetary compensation. These remedies require the parties to the collective agreement to do battle over issues, documents filed with the Board on the agreement of the parties (or duly proven), and the testimony of the course of an elapse of time....

(The Board found that the complainant's delay (of eight months) was not "extreme" in the circumstances of that case and declined to dismiss the complaint without hearing the merits.)

7. With those general principles in mind, the Board will now consider the circumstances of the present complaint. The facts set forth in this decision are based upon various undisputed facts stipulated by counsel, documents filed with the Board on the agreement of the parties (or duly proven), and the testimony of the complainant and Ron Fleet, the union's divisional chairman responsible for grievances arising out of the Stelco division in which the complainant was employed prior to his termination. In his testimony before the Board, the complainant did not confine his evidence to the issue of delay but rather (without objection by the respondents) proceeded to present all of his evidence concerning the merits of his complaint. At the conclusion of his testimony, the complainant advised the Board that he did not intend to call any further evidence concerning delay or concerning the merits of his case. Although counsel for the union reserved the right to call further evidence concerning the merits of the complaint in the event that the Board declined to dismiss the complaint on the ground of delay, the union did adduce some evidence on the merits through Mr. Fleet's testimony.

8. The complainant commenced employment with Stelco in 1962. As a result of injuries sustained in various mishaps, including two motor vehicle accidents, the complainant was away from work for substantial periods of time from 1974 to the date of his termination. After he had been absent for a continuous period of three years and a day, Stelco notified him (by letter dated October 18, 1979) that effective as of October 9, 1979, his service and employment with Stelco was terminated "in accordance with Clause 7.02 of the Basic Agreement", which provides, in part, as follows:

Service and employment shall be terminated when an employee:

• • • •

- (d) Is absent due to a disability not compensable under the Workmen's Compensation Act, for a period exceeding the limits set forth in 7.03(a) relating to length of service and recall entitlement.

(The maximum length of recall entitlement set forth in Clause 7.03(a) is "thirty-six months".)

9. After receiving that termination letter, the complainant consulted with his lawyer, who advised him to take it to the union. The complainant later brought the letter to Mr. Fleet who filed a grievance on his behalf on December 7, 1979. That grievance alleged that the complainant had been unjustly discharged in violation of the Basic Agreement and requested reinstatement with full seniority and payment of all monies lost. It was subsequently denied by the company at each step of the grievance procedure. By letter dated March 21, 1980, the union referred the grievance to arbitration and provided the company with the name of the union nominee to the arbitration board. Stelco challenged the grievance's arbitrability on the ground that the grievance was not filed or processed in a timely manner. However, the company proceeded to name its nominee to the arbitration board without prejudice to its right to pursue the timeliness challenge. An arbitration board chairman was then selected by the nominees and the arbitration was subsequently scheduled to be heard on March 5, 1981.

10. On January 6, 1981, Mr. Fleet met with the complainant concerning his grievance and explained to him that for his grievance to continue, the union needed certain medical information and information concerning the complainant's delay in requesting the union to grieve his termination. Since the complainant did not provide that information, the grievance committee decided to "withdraw [his grievance] without prejudice" as they did not feel it would be successful at arbitration. The complainant was advised of that decision by letter dated January 26, 1981, and by a telephone conversation with E. Sutherland, the union's recording secretary, in early February of that year. Mr. Sutherland subsequently advised the complainant that he could appeal the grievance committee's decision to the "steward body". As a result, the complainant filed an appeal, which was unable to be heard until March 4, 1981, due to a backlog of appeals. In view of the date on which that appeal was to be heard, the arbitration hearing scheduled for the following day was adjourned, on the understanding that it would be rescheduled in the event that the complainant's appeal succeeded. The steward body allowed the complainant's appeal and overruled the grievance committee's decision to withdraw his grievance. However, it does not appear that the complainant took any steps during the balance of that year to supply the further information which had been requested by Mr. Fleet.

11. During the summer and fall of 1981, the union and the company were involved in a very difficult set of negotiations for a new collective agreement. It had long been the practice of the respondents to deal with large numbers of unresolved grievances in the negotiation process. Although the union initially declined to deal with grievances in the 1981 negotiations, during the course of the strike which commenced in August of 1981 and did not end until November of that year, the union's negotiating team "was compelled by the circumstances of collective bargaining" to do so. Before dealing with the complainant's grievance and negotiations, members of the union negotiating committee discussed its merits (and the merits of a number of other grievances) with Mr. Fleet.

12. Approximately 250 grievances, including the complainant's grievance, were resolved during negotiations. Some of them were fully allowed, others were resolved by means of compromise settlements mutually acceptable to the respondents, and others were withdrawn by the union. Although the union "pushed as hard as it could" with respect to the complainant's grievance, the company refused to move on it and ultimately, after duly considering the merits of the grievance and its prospects for success, the union agreed to withdraw the grievance on November 11, 1981.

13. The ratification of the settlement which ended that strike occurred in late November or early December of 1981. Since there are over 10,000 employees in the bargaining unit, thousands of employees were involved in the ratification process. At the ratification meeting, employees were advised that about 250 grievances had been resolved as part of the settlement package; however, no details were provided except in response to specific questions. There is no evidence that anyone raised any questions about the complainant's grievance.

14. The union grievance committee did not meet for some time following the strike since the union did not have sufficient funds to enable it to meet. However, shortly after it began to meet again in late January or early February of 1982, Mr. Fleet advised the complainant in a telephone conversation that his grievance had been withdrawn by the union in negotiations and that, accordingly, it was "finished". The complainant may not have fully understood the details of the information which Mr. Fleet was attempting to convey to him in that conversation. Moreover, it is apparent from his testimony before the Board that his recollection of that conversation and other events material to his complaint has been substantially impaired by the passage of time. During his cross-examination by counsel for the union, the complainant denied that he was ever told that his grievance had been withdrawn as part of the 1981 settlement between the union and the company. However, in the face of that assertion, he was unable to provide a satisfactory explanation for the inclusion of the following sentence in paragraph 7 of Schedule "A" to the complaint prepared by his lawyer (who was not in attendance at the hearing) on the basis of information provided by the complainant:

The only so-called explanation that I have received from the union is that [the arbitration of my grievance] was cancelled because Stelco wanted all arbitrations cleared up before it would enter into a new agreement with Local 1005 in 1981.

Having regard to all of the circumstances, including the relative credibility of the testimony of the complainant and Mr. Fleet, the Board finds that the complainant was told in late January or early February of 1982 that his grievance would not be proceeding to arbitration as it had been withdrawn during negotiations.

15. Mr. Fleet did not hear from the complainant again until August of 1982, when he met with Mr. Fleet and Len Taylor, the newly-elected chairman of the grievance committee. During that meeting Mr. Taylor confirmed that the complainant's grievance had been withdrawn during negotiations. He also explained that union officials had taken that action because they were of the view that his grievance would not succeed at arbitration. In this regard Mr. Taylor noted that the complainant had failed to provide the union with a letter from his lawyer explaining his delay in approaching the union about filing a grievance concerning his termination, and had also failed to provide a proper medical report. Mr. Taylor suggested that if the complainant would provide him with that documentation, he would see what he could

do about getting the company to rehire the complainant. Thereafter, the complainant provided the union with a letter from his lawyer, but the union did not find its contents to be of any assistance. In March of 1983, the complainant delivered to the union office the following letter (dated August 18, 1982) from his orthopaedic surgeon:

I last examined Mr. Nagy on September 5 1979, at which time he felt he was well enough to do his job as a crane operator and I felt he was well enough to do so.

Since union officials were of the view that the documentation belatedly provided by the complainant did not provide any basis for reopening the complainant's grievance which had been withdrawn in November of 1981, they made no further contact with the company concerning the matter. Thus, between November of 1981 and the filing of the instant complaint, nothing occurred that would have led the company to believe that the withdrawal of the complainant's grievance had not conclusively disposed of the issue of the propriety of the company's termination of the complainant's employment in October of 1979.

16. The complainant's explanation for why it took him until October 25, 1983 to file this complaint with the Board was quite vague and unsatisfactory. Although he had ready access to legal advice shortly after he was terminated in October of 1979, and knew by February of 1982 that his grievance was not going to be arbitrated by the union, he took no steps to assert any claim against the union until the fall of 1983, following discussions with "friends and [a] neighbour". His explanation that he was "too stupid to do anything" has a hollow ring to it in view of the fact that he had demonstrated as early as 1979 that he had the acumen to seek legal advice when uncertain about the course of action to be pursued.

17. Having regard to all of the circumstances, the Board finds that there has been extreme and unwarranted delay on the part of the complainant in filing this complaint. As a result of that delay, the complainant is now seeking to have referred to arbitration a grievance which pertains to events that occurred more than four years ago, and which the respondents reasonably believed to have been laid to rest in November of 1981. The complainant first became aware in February of 1982 of what he now alleges to be a breach of section 68 of the Act. As indicated above, he has not provided a satisfactory explanation for his delay of over a year and a half in filing this complaint. The remedy which he seeks involves extensive retrospective financial liability for the respondents and could well adversely impact on the relationship between the company and the union by requiring the respondents to (in the words of the Board in *Caravelle Foods, supra*) "do battle over an individual's rights which they both considered no longer an issue in their relationship because of an elapse of time", and because of a settlement negotiated in good faith in accordance with a longstanding practice between the respondents. Moreover, as is apparent from the complainant's inability to recall a number of material facts pertaining to his termination and subsequent events, his claim is of such nature that fading recollection and the deterioration of evidence would tend to hamper a fair hearing of the issues in dispute.

18. Therefore, having regard to all of the circumstances and the considerations set forth in the Board's jurisprudence referred to earlier in this decision, the Board is of the view that this is a proper case in which to decline, in the exercise of the Board's discretion under section 89(4) of the Act, to schedule a hearing for the purpose of further inquiring into the merits of the complainant's case.

19. In the circumstances of this case, the Board also finds it appropriate to note that no useful purpose would be served by scheduling a hearing for the purpose of further inquiring into the merits of Mr. Nagy's complaint. As indicated above, in his testimony before the Board the complainant did not confine his evidence to the issue of delay, but rather proceeded to present all of his evidence concerning the merits of his complaint. Having regard to that evidence, the evidence of Mr. Fleet on behalf of the union, and the undisputed facts stipulated by counsel, the Board is satisfied that there has not, in any event, been a contravention of section 68 of the Act by the respondent union. The Board has consistently held that section 68 does not require a trade union to carry any particular grievance through to arbitration simply because a grievor wishes to have it arbitrated. Furthermore, it is not the function of this Board to "second guess" a union decision not to arbitrate a particular grievance. A union is not required to be correct in its assessment of the merits of a grievance; it is sufficient if the union has directed its mind to the grievance and arrived at a reasoned judgment of what to do after assessing the various relevant considerations, including how critical the subject matter of the grievance is to the interests of the grievor, and how much validity his grievance has. Moreover, the Board has held that the respondents' procedure "that ties grievance negotiations to the negotiation of a new collective agreement in order to provide an underlying urgency for compromise and rational discussion" is not "inherently unfair or arbitrary". See, for example, *Nick Bachiu*, [1975] OLRB Rep. Dec. 919, at paragraph 15. In that case, which involved the very respondents that are before the Board in the present case, the Board found that the union had not breached section 68 (then section 60) of the Act by withdrawing Mr. Bachiu's grievance (along with 203 other grievances) during the course of negotiations after duly considering the merits of his grievance. (As in that case, there is no evidence that the complainant's grievance was traded off against unrelated grievances or exchanged for a promise of value to other members of the bargaining unit.)

20. Having regard to all of the evidence and the submissions of the parties, including the evidence adduced by the union in respect of this matter and the undisputed facts stipulated by counsel, the Board finds that the union has met the requirements of section 68 of the Act and has not acted in a manner that is arbitrary, discriminatory, or in bad faith in the representation of the complainant.

21. For the foregoing reasons, this complaint is hereby dismissed.

1149-83-R Canadian Union of Public Employees, Applicant, v. **St. Joseph Nursing Home (Rockland) Limited**, Respondent, v. Group of Employees, Objectors

Representation Vote – Names of employees on maternity leave left out of voters' list – Employee not making any inquiry or complaint prior to vote – Board not directing new vote on basis of objections made after vote – Board reviewing policy re eligibility to vote of employees not at work on vote date – Confirming eligibility of employees on maternity leave

BEFORE: R. D. Howe, Vice-Chairman, and Board Members W. G. Donnelly and F. S. Cooke.

APPEARANCES: Robert Rouleau for the applicant;

W. T. Langley and Roger Charron for the respondent; Noella Morin for the objectors.

DECISION OF THE BOARD; December 1, 1983

1. In a decision dated October 4, 1983 in this application for certification, another panel of the Board directed that a representation vote be taken of the employees in bargaining unit #1 (full-time employees) and bargaining unit #2 (part-time employees and students), as described in paragraph 4 of that decision. (It appears that "persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" were inadvertently omitted as express exclusions from bargaining unit #1 in that paragraph.)

2. No statement of objections and desire to make representations has been filed with the Board concerning bargaining unit #2 within the time fixed under subsection 1 of section 70 of the Board's Rules of Procedure following the taking of the representation vote in respect of that unit pursuant to the Board's direction of October 4, 1983. On the taking of that vote, not more than fifty per cent of the ballots cast were cast in favour of the applicant. Accordingly, the application for certification in respect of bargaining unit #2 will be dismissed (with the usual six month bar).

3. A timely statement of objections and desire to make representations (in the form of a letter dated October 20, 1983) was filed with the Board by Jocelyne Dupuis and France Faubert. Accordingly, a hearing was held in Ottawa by this panel of the Board on November 21, 1983 for the purpose of considering the report of the Returning Officer, and the evidence and representations of the parties with respect to that letter.

4. Mrs. Dupuis commenced employment with the respondent in September of 1978 and worked as a full-time nurse's aide until March 31, 1983 when she went on maternity leave until October 15, 1983. (Although her leave was originally scheduled to expire on September 17, Mrs. Dupuis telephoned Yolande Beauchamp, the respondent's Director of Nursing, in early September and indicated that she had been advised by her physician that she would not be fit to return to work until mid October. Accordingly, Mrs. Beauchamp agreed to hold her job open until that time.)

5. Mrs. Faubert's employment with the respondent commenced in January of 1980 and

she also worked as a full-time nurse's aide until she went on maternity leave on July 21, 1983. As of the date of the hearing of this matter, Mrs. Faubert had been cleared by her physician and expected to return to work on November 28, 1983. Mrs. Beauchamp testified that the respondent is also holding Mrs. Faubert's job open by using part-time employees to fill in during her absence.

6. Prior to the October 13, 1983 representation vote, Mrs. Dupuis and Mrs. Faubert each received in the mail the following notice (printed in English and French) from the applicant:

TO ALL EMPLOYEES OF ST. JOSEPH NURSING HOME

As you know, many of your fellow employees have decided to help improve their working conditions by joining C.U.P.E. – the Canadian Union of Public Employees. They did that because they know that C.U.P.E. is the major Union for nursing home workers in Ontario. It has helped thousands of employees like you, win better conditions of work.

Meanwhile, some employees have signed a petition saying they do not want a Union to help them improve their jobs and this has created some ill-feelings. But we should all be working together to help ourselves, our families and the patients. That is why the question of a Union for us will be settled by a vote next Thursday, October 13th. The Ontario Labour Relations Board will conduct the vote and make sure it is secret – no one will ever know how you voted.

Let's start working together. Because by working together in a Union, we can all help each other improve working conditions. Vote for yourself, Thursday and vote for C.U.P.E.

DATE:

October 13, 1983

PLACE:

Recreation Room
St. Joseph Nursing Home

TIME:

7:00 a.m. to 9:00 a.m.
3:00 p.m. to 5:00 p.m.

NOTE:

You are entitled to vote during working hours!

If you want to improve your working conditions, make sure you come and vote on Thursday and vote for yourself – vote for C.U.P.E.

For more information, contact:

Alice Leblond 446-4423
Pierrette Cote 488-2671

7. Prior to the date of the representation vote, Mrs. Faubert telephoned Therese Desormeaux, another of the respondent's full-time nurse's aides, and requested Mrs. Desormeaux to drive her to the respondent's premises on October 13, 1983 so that she could vote. Mrs. Desormeaux agreed to do so. However, when she found that Mrs. Faubert's name was not on the voters' list (posted by the respondent in conspicuous places on its premises, together with the Board's Form 69 Notice of Taking of Vote, in accordance with the Deputy Registrar's written instructions), she "phoned [Mrs. Faubert] and told her that she couldn't come to vote because her name wasn't on the list."

8. The third sheet of the voters' list contains the following information:

ANY EMPLOYEE WHOSE NAME DOES NOT APPEAR ON THE
VOTERS' LIST OR CHALLENGED VOTER WHO FEELS THAT HE
OR SHE IS ENTITLED TO VOTE SHOULD TAKE THIS MATTER
UP WITH THE RETURNING OFFICER DURING THE TAKING OF
THE VOTE.

Mrs. Desormeaux did not read that sheet and, accordingly, did not communicate that information to Mrs. Faubert. Nor did she inform Mrs. Faubert that the Board's Form 69 Notice of Taking of Vote contains the following statement: "The Returning Officer is the proper person to whom inquiries should be directed by employees who are in doubt as to their eligibility to vote or as to the voting procedure."

9. Although Mrs. Faubert testified that she "wondered why [her] name wasn't on the list", she did not attempt to contact anyone from the Board, the employer, or the union about that matter prior to the vote. It was only after the vote had been conducted and the ballots counted that Mrs. Faubert raised any question or objection about the matter.

10. When Mrs. Dupuis attended at the respondent's premises on October 13 for the purpose of voting, Yolande Beauchamp, who served as the respondent's scrutineer at the vote, told her that she could not vote because her name was not on the voters' list. Robert Rouleau, the applicant's scrutineer who was seated nearby, confirmed that her name was not on the list. When Mrs. Dupuis asked why she could not vote, Mrs. Beauchamp told her that she was ineligible to vote because she was on maternity leave. Mr. Rouleau did not at that time express any disagreement with that statement (although he advised the Board at the hearing of this matter that the union does not dispute the right of an employee to vote while on maternity leave). Mrs. Dupuis then turned, walked out of the room where the vote was being held, and went back home. After she left, the Board's Returning Officer, who had either not heard or fully understood the conversation between Mrs. Dupuis and Mrs. Beauchamp, asked the latter, "Why couldn't she (Mrs. Dupuis) vote?" When Mrs. Beauchamp answered, "Because she's on maternity leave", the Returning Officer indicated that (in Mrs. Beauchamp's words) "something could have been done". While Mrs. Beauchamp could not recall precisely what the Returning Officer said, it is probable that he attempted to indicate to the scrutineers that Mrs. Dupuis could have been permitted to cast a segregated ballot (in accordance with the

normal practice adopted in situations involving a person whose eligibility to vote is in doubt). However, by that time Mrs. Dupuis had departed and it appears from the evidence before the Board that no one attempted to contact her to correct the misinformation that she had been given by Mrs. Beauchamp, with the acquiescence of Mr. Rouleau.

11. On the Tuesday following the vote, Mrs. Desormeaux called Mrs. Faubert and told her that a sheet had been posted (Form 70 Notice of Report of Returning Officer) which indicated that employees had until October 21, 1983 "to contest". The next day Mrs. Faubert and Mrs. Dupuis spoke with Mrs. Beauchamp and told her that they wanted to contest the vote. Mrs. Beauchamp, who "didn't know what to say", expressed doubts concerning whether it would be "worth it" for them to cause further hard feelings within the Home by attempting to contest the vote. However, she agreed to ask the owner (Roger Charron) if anything could be done. When Mrs. Beauchamp raised the matter with Mr. Charron, he contacted counsel, on whose advice Mrs. Faubert and Mrs. Dupuis were told that it was their privilege to raise the matter with the Board if they wished to do so, but that "whatever they did, they were on their own" because management "didn't want to get involved".

12. Mrs. Dupuis and Mrs. Faubert have requested the Board to set aside the aforementioned vote and direct that a further representation vote be held in the aforementioned statement of desire filed with the Board by Mrs. Dupuis and Mrs. Faubert. Under the circum argument that there was a nurse's aide on Workmen's Compensation at the time the vote was ordered who may not have been given an opportunity to vote. However, no evidence whatsoever was adduced before the Board concerning that person's circumstances, or concerning whether he or she attempted or even desired to vote. That individual has not filed a statement of desire in accordance with section 70(1) of the Rules of Procedure, nor is he or she referred in the aforementioned statement of desire filed with the Board by Mrs. Dupuis and Mrs. Faubert. Under the circumstances, we are not prepared to take into consideration in deciding this case the respondent's belated reference to that individual. Not only is there no evidence before the Board from which it can be determined whether that person was eligible to vote and, if so, whether he or she desired or attempted to vote, but there is also nothing before us which suggests that any representative of the respondent ever proposed at any time prior to the argument stage of the hearing of this matter that the individual in question should be added to the voters' list to which the parties agreed on October 3, 1983. Moreover, the applicant received no notice prior to the hearing of this matter that anyone intended to raise any matter pertaining to that individual. Accordingly, we shall dispose of this application without further reference to that person.

13. In his submissions on behalf of the applicant, Mr. Rouleau stated that the union does not dispute the right of an employee to vote while on maternity leave. However, he noted that neither Mrs. Dupuis nor Mrs. Faubert contacted the Board, the employer, or the union prior to the vote to complain about their omission from the voters' list. Rather, they objected only after the results of the vote were known. Accordingly, Mr. Rouleau contended that the applicant should be certified forthwith and that no further vote should be directed.

14. Noella Morin appeared at the hearing as the representative of the objectors. She was afforded an opportunity to adduce evidence and to make submissions to the Board but declined to do so.

15. As indicated above, it was common ground among the parties who made submissions to the Board in respect of this matter that an employee on maternity leave is eligible to cast a ballot in a representation vote. In *The Regional Municipality of Durham*, [1980] OLRB Rep. Jan. 90, the Board accepted the agreement of the parties to that case and ruled that a registered nurse absent on pregnancy leave was eligible to vote in a representation election. In determining the eligibility to vote of a person who is not at work on the date of a representation vote, the Board has regard to the continuance of the employment relationship (see, for example, *Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723, and *SGS Supervision Services Inc.*, [1982] OLRB Rep. Jan. 105). Thus, in *Alex's Plumbing and Heating Limited*, [1970] OLRB Rep. Feb. 1321, the Board held that an employee who had been absent from work on Workmen's Compensation for about two months prior to a representation vote was eligible to vote since he remained an employee of the company at the time of the vote. (In that case, it was the evidence of the individual in question that "he had not terminated his employment with the respondent, he had not asked for his unemployment insurance book and that he wanted to return to work for the respondent as soon as he got his release from the doctor and the Workmen's Compensation Board." That evidence was confirmed by the president of the respondent company.)

16. It is well established in the Board's jurisprudence that persons on indefinite layoff are not permitted to cast ballots in Board representation votes (see, for example, *Hurdman Bros. Limited*, [1983] OLRB Rep. Feb. 238, and *Custom Aggregates*, [1978] OLRB Rep. March 215). The rationale for that approach is that it would be unfair to allow persons whose prospects for continued employment are so uncertain to participate in the selection or rejection of a bargaining agent. The same cannot legitimately be said of a person who is absent from work on maternity leave. Under section 38 of the *Employment Standards Act*, R.S.O. 1980, c. 137, a person who is absent from work on "pregnancy leave" is, on the expiration of such leave, entitled to return to her previous position with the employer (or to alternative work of a comparable nature at not less than her wages at the time her leave began). Thus, the Board is satisfied that the parties are correct in their view that employees such as Mrs. Dupuis and Mrs. Faubert who are absent from work on maternity leave when a representation vote is directed or taken, but have not resigned or been terminated, are eligible voters because their prospects for continued employment are sufficiently certain to render it appropriate for them to participate in a representation vote.

17. However, a finding of eligibility to vote does not, of course, resolve the instant case. It is necessary to consider whether the facts set forth above should prompt the Board to set aside the representation vote in the circumstances of this case and direct that a further representation vote be taken. Having regard to all of the evidence and the submissions of the parties, the Board is of the view that it should not exercise its discretion to set aside that vote and order a further representation vote in the circumstances of this case. As indicated above, although Mrs. Faubert was aware that her name was not on the voters' list, she did not attempt to contact anyone from the Board, the employer, or the union about the matter prior to the vote, despite the fact that she had received a notice from the union suggesting that she was entitled to vote and providing her with the names and telephone numbers of two fellow employees who could be contacted for more information. That notice also informed her that the "Ontario Labour Relations Board will conduct the vote". Thus, it should have been apparent to Mrs. Faubert, regardless of whether she was aware of the information contained on the third page of the voters' list or on the Board's Form 69 Notice of Taking of Vote, that she could contact the Board prior to the vote or attend at the respondent's premises on the

day of the vote to question her omission from the voters' list and attempt to obtain permission to cast a ballot. The dramatic contrast between Mrs. Faubert's inaction prior to the vote and the vehemence with which she asserted her position at the hearing of this matter, and our overall assessment of the credibility of her evidence, lead us to conclude that Mrs. Faubert only became truly concerned about her omission from the voters' list after she became aware that a majority of the ballots cast in the representation vote in respect of bargaining unit #1 were marked in favour of the applicant. (Fifteen of the twenty-eight ballots were marked in favour of the applicant, with the remaining thirteen ballots being marked against the applicant.) While it is regrettable that the parties omitted her name from the voters' list, we are not prepared to set aside the representation vote on the basis of the circumstances pertaining to Mrs. Faubert, as she did not make any effort to remedy the situation prior to the vote. Where prior to and on the day of a vote an employee has unreasonably remained silent and inert concerning his or her eligibility to vote, it is inappropriate and inconsistent with the purposes of the *Labour Relations Act* to permit that employee, prompted by dissatisfaction with the results of the vote, to belatedly attempt to overturn those results by having the vote set aside. Had Mrs. Faubert taken the obvious step of attending at the vote and raising with the Returning Officer the matter of her eligibility to vote, she would undoubtedly have been permitted to cast a ballot (which would have been segregated by the Returning Officer if any of the parties had challenged her eligibility to vote). In the absence of any such action, or of any inquiry to the Board, the union, or the employer by Mrs. Faubert prior to the vote, we are not prepared to grant her request that a new vote be directed so that she may now cast a ballot.

18. The circumstances pertaining to the unsuccessful attempt by Mrs. Dupuis to be permitted to cast a ballot in the representation vote are considerably more compelling than those described above in respect of Mrs. Faubert. However, even if Mrs. Dupuis had not abruptly departed from the voting area but rather had remained to speak with the Returning Officer and had been permitted to cast a (segregated or nonsegregated) ballot, such ballot could not have materially affected the outcome of the vote since the union would have won the vote by a margin of at least one ballot, regardless of whether she voted in favour of the union or against it. Thus, a ballot cast by Mrs. Dupuis could not have affected the applicant's entitlement to certification under section 7(3) of the Act which provides, in part, as follows:

If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, ... the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

19. For the foregoing reasons, the Board declines to set aside the representation vote or direct that a further representation vote be taken.

20. A certificate will issue to the applicant in respect of bargaining unit #1 (that is, all employees of the respondent in Rockland, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nursing staff, supervisors, persons above the rank of supervisor, technical and office staff, employees regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period).

21. The application for certification in respect of bargaining unit #2 is hereby dismissed.

22. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in bargaining unit #2 within the period of six months from the date hereof.

23. The Registrar will destroy the ballots cast in the representation votes taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.

2482-82-R United Brotherhood of Carpenters and Joiners of America, Applicant, v. T and F Construction Equipment Rental Limited, Respondent, v. Labourers' International Union of North America, Local 183, Intervener #1, v. The Form Work Council of Ontario, Intervener #2

Evidence – Membership Evidence – Practice and Procedure – Evidence tendered differing from specific statement of particulars – Not reason to discredit testimony – Only material facts and not evidence required to be disclosed by Rule 72 – Union official misrepresenting that union membership required to continue employment – Implying that union having employer blessing – Board not giving any weight to membership evidence

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members I. M. Stamp and C. A. Ballentine.

DECISION OF THE BOARD; December 9, 1983

1. There have been two earlier decisions issued with respect to this application for certification. It will be useful for the purposes of this decision to set out some of the chronology of some of the events since the making of the application. The application was filed with the Board March 4th, 1983 and it requested the Board to direct the holding of a pre-hearing representation vote. On March 15th, 1983, the Labourers' International Union of North America, Local 183 ("Local 183") filed a timely "Application for Certification by Intervener, Construction Industry" signed by its business agent, John Colacci.

Subsequently, on March 18th, two separate "Intervention, Construction Industry" forms were filed on behalf of Local 183 and intervener #2 by their solicitors. These two interventions were signed by counsel for the interveners and, for all material purposes, were identically worded. The interventions raised a number of issues, one of which was the allegation that the membership evidence should not be relied on by the Board because it was obtained by "... intimidation, coercion, fraud and misrepresentation contrary to the Act ...". The Board, differently constituted, issued a decision March 28th directing that a pre-hearing representation vote be held. It directed also that each ballot cast be segregated, the ballot box be sealed and the application be listed for hearing following the vote to deal with all matters arising out of and incidental to the application. Those matters include, inter alia, the interveners' allegations with respect to the reliability of the membership evidence. The vote was held as directed on

April 14th, the ballot box sealed and on May 13th the matter came on for hearing. That hearing, by agreement of the parties, dealt only with the manner in which the Board would proceed to deal with the multiple issues raised by the application and the interventions. The Board's decision which issued July 25th, 1983, set out the order and manner of procedure. In general terms, the Board ruled that it would hear first the evidence and representations of the parties with respect to the reliability of the membership evidence and, if the determination of that issue did not dispose of the case, the Board would then proceed with the remaining issues in a particular order. These matters did not come before the Board again for hearing until November 3rd and 4th because, in part, another application involving several issues common to the instant one and the same trade union parties was also before the Board differently constituted. The parties in both cases have attempted to move in a manner which may ultimately enable them to consent to having the two cases heard together. In that respect, at the conclusion of hearing the evidence and argument concerning the membership evidence allegations, the parties requested the Board to adjourn the proceedings, determine that issue and, if the application was to require further hearing, the parties would attempt to reach an agreement which would enable the two applications to be consolidated with respect to the issues which are common to them.

2. This decision, therefore, deals solely with the allegation that the Board should not rely on the membership evidence tendered by the applicant in support of the application. Both interventions submit that:

“... the Board can place no weight upon the membership evidence submitted by the applicant as it was obtained by intimidation, coercion, fraud and misrepresentation contrary to the Act and accordingly, the Application ought to be dismissed. In particular, the membership evidence was obtained by a business agent of the applicant, Tony Iannuzzi (“Iannuzzi”) on or about February 25, 1983 at approximately 7:30 a.m., when he arrived at the job and told the subject employees that he had been sent to the job site by Antonio Fontana, the principal of [TandF Construction Equipment Rental Limited], and in accordance with Fontana's instructions, all the employees must sign membership cards for the applicant.”.

3. The Board heard three witnesses, Cesidio Carnevale, Dante Rotondo and Tony Iannuzzi. Carnevale and Rotondo testified on behalf of the interveners. Carnevale was the respondent's working foreman on the construction site on which its employees were engaged at the time of this application. Rotondo was a layout man. They were examined prior to Iannuzzi and each was excluded from the hearing while the other testified. Iannuzzi is a business representative for the applicant and is the person who signed to membership in the applicant the employees of the respondent whom the applicant seeks to represent. Iannuzzi was the advisor to counsel for the applicant in the hearing and, consequently, was not excluded from the hearing when Carnevale and Rotondo testified.

4. It is uncontested that the respondent is a concrete forming contractor and was engaged in the construction of a nursing home in Toronto at the time this application was made.

5. The evidence of all three witnesses is in general agreement with respect to the fact that Iannuzzi visited the construction project on February 25th, at approximately 7:30 a.m. and spoke with the respondent's employees in its job shack prior to the start of their shift.

He introduced himself as a business representative of the applicant and presented his business card indicating that that was his position. His evidence and Carnevale's agree also that Iannuzzi had in his possession a slip of paper on which was written the address of the site and Carnevale's name.

6. The testimony of the three witnesses is in significant disagreement with respect to what Iannuzzi said to the employees when he was talking with them prior to signing them to membership in the applicant.

7. Carnevale testified that Iannuzzi spoke to him in front of the rest of the employees, all of whom were in a position to hear everything which Iannuzzi said. According to Carnevale, Iannuzzi stated that he had spoken the previous evening with the owner, Fontana. Carnevale claims that Iannuzzi then remarked that the men were working on a commercial job (in other words, a job in the industrial, commercial and institutional sector of the construction industry), that members of Local 183 could not work on commercial jobs and would have to join the applicant in order to remain on the job; if they did not, they could not work on it anymore. Carnevale believed that, if Iannuzzi was correct about the job being a commercial one, he would not be able to work on it as a member of Local 183, so why not pay a \$1.00 and join the applicant. Carnevale's reference to paying a \$1.00 is with respect to the amount which the applicant will accept from new members during an organizing campaign in lieu of its normal initiation fee. Carnevale testified that Rocco Lotito, a business representative of Local 183, visited the job site the next day and when Lotito learned from the employees that they had signed membership applications with the applicant, he chastised them. This angered Carnevale because on the one hand they were being told by one union that they would have to sign with it in order to work on the job anymore and on the other hand were being told by the union of which he and Rotondo were members that they should not have applied for membership in the applicant. That same day, Carnevale was speaking on the telephone with Fontana about the job and asked Fontana angrily why he had sent Iannuzzi to the job. Carnevale claims that Fontana denied sending anyone to the job the previous day.

8. When Carnevale was asked by respondent counsel whether Iannuzzi had told the employees what Fontana wanted them to do with respect to joining the applicant, Carnevale answered that Iannuzzi did not say that Fontana wanted the employees to join the applicant; but did say that he had talked to Fontana the night before. Lotito was present in the hearing room while Carnevale was testifying and had been pointed out by him as the Local 183 business representative who had come to the job site the day after Iannuzzi. When applicant counsel cross-examined Carnevale with respect to what he had reported to Lotito about the prior day's events, Carnevale said that he told Lotito that the employees had signed application cards with the applicant "because Iannuzzi had told them they could not work on the job if they did not sign". When asked what else he had told Lotito about Iannuzzi's remarks to the employees, he did not remember telling Lotito anything else. Carnevale was not re-examined on any of his testimony by counsel for the interveners.

9. Rotondo's evidence is in basic agreement with Carnevale's, except, when Rotondo arrived on the job, Iannuzzi was already there and speaking with the employees. When Rotondo entered the job shack, Iannuzzi introduced himself. Rotondo had not heard Iannuzzi say that he had spoken with Fontana the night before, but he did hear other employees in the shack talking about that subject. Carnevale, according to Rotondo, told him in Iannuzzi's presence that Iannuzzi had spoken with Fontana the night before. When Iannuzzi said nothing,

Rotondo thought he was agreeing with what Carnevale had said. Rotondo also testified that Iannuzzi told the employees that they had to become members of the applicant because it was a commercial job on which they were working and Local 183 members cannot do commercial work. Rotondo signed an application card because of what Iannuzzi had told him about not being able to work on a commercial job as a member of Local 183 and this was consistent with his own understanding over many years. As a result of what Iannuzzi said and of his own understanding, he thought that he might lose his job if he did not join the applicant. He told the Board that fear of the possible loss of his job was what caused him to sign the application for membership with the applicant.

10. Carnevale has worked in concrete forming construction for 20 years and Rotondo for 16 years. Both are members of Local 183 and it is the only trade union to which either of them has belonged. Carnevale has been a member since 1976 and Rotondo has been one for about five years.

11. Iannuzzi's superior, Gus Simone, sent him to the respondent's job site. It was Simone who supplied Iannuzzi with the address of the job site and Carnevale's name. Iannuzzi was told by Simone that the respondent had a foreman by that name and that he might be foreman on the job in question. Iannuzzi's instructions were to go out to the job and try and sign up the respondent's employees for membership in the applicant.

12. Iannuzzi's version of what he said to the employees as given in his examination-in-chief was as follows. When he arrived on the job and went to the respondent's job shack, he asked who was foreman. Carnevale spoke up and Iannuzzi introduced himself and gave Carnevale his business card. He told Carnevale and the other employees that the applicant was organizing some forming companies and that it could get the employees better wages and benefits. The employees responded to the effect that Local 183 represented the employees of all the concrete construction forming companies, to which Iannuzzi claims to have replied that the carpenters had the ICI forming companies and the value of the wage and benefit package in its agreement was \$22.00 per hour. When Iannuzzi asked Carnevale if he would like to sign up with the applicant, Carnevale said "For \$1.00 sure, why not". While Carnevale was signing a card, Iannuzzi looked around and the other employees were lining up to sign cards as well. Iannuzzi flatly denied that he had spoken to Fontana the night before or that he had made such a statement to the employees. He did say, however, that Fontana's name was mentioned as part of his response to the employees' claim that Local 183 represented all of the forming companies. He pointed out to them that their boss, Fontana, had been a business representative working with Simone at a time when Simone was organizing the employees of forming contractors.

13. When Iannuzzi was being examined by respondent counsel, he denied having said anything about the respondent's job being a commercial one. He claimed that, when he entered the job site, he thought it to be an apartment building job, not a commercial job. He also told counsel that, after signing the employees to membership applications, he went back to his office to file this application for certification and did not attempt to visit anymore jobs that day. When counsel asked him how many jobs he visited each day in order to try and sign up members for the applicant, he replied that he tries to visit several jobs everyday for that purpose. When he asked how many jobs he had actually visited for that purpose the day before going to the respondent's job site, he replied that he had visited two or three. Then he recalled that these were jobs on which members of the applicant were already working

under a collective agreement. When Iannuzzi was pressed by counsel to recall how many jobs he had visited after his visit to the respondent's job site, he replied that he tried everyday to go to "non-union" jobs, but he could not give any specific dates or jobs visited. Finally, he admitted that the last time he could remember going on a job to sign up employees was in July of 1983.

14. When he was cross-examined by counsel for the interveners, he denied again having told the employees that the job was a commercial one. He admitted that he had testified that he thought the project to be an apartment building, but he really did not give much thought to the kind of job it was when he arrived at the job site. He told counsel that, as he entered the site, he saw a trailer alongside of the foundation and the kind of forms which were being used. That, he claimed, is what caused him to think that it was an apartment building. When it was pointed out to him that the \$22.00 wage and benefit package to which he had referred was the wage package in the Carpenters' Provincial Agreement covering commercial work, he claimed only to be aware of that rate because it was the rate paid to members of Local 27 of the applicant. He admitted that he did not know what rate was paid to carpenters on apartment buildings and that his organizing work was primarily in the house building part of the residential sector of the construction industry. When he described to counsel the start of his encounter with Carnevale after arriving in the job shack, he testified that he asked for Carnevale by name and asked him if he was the foreman. He told counsel that Carnevale did not register any surprise because Iannuzzi knew his name. He denies also that he told Carnevale that he had spoken the night before with Fontana. When he was asked what he had done after signing the employees and leaving the project, he repeated his earlier testimony that he had returned to the office. Then, on reflection, he admitted that he had not prepared and filed the application for certification. Rather, he claimed that he had turned over the membership evidence to Simone and that Simone had ultimately filed the application. Iannuzzi thought that he had reviewed it before it was filed, but did not specifically recall that the application showed the job site to be a nursing home.

15. All three witnesses were testifying under a common handicap, that is trying to recall events which took place eight months prior to giving their testimony. Application of the usual factors for assessing credibility of witnesses: the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections and their demeanor would ordinarily cause the Board to prefer the evidence of Carnevale and Rotondo to that of Iannuzzi where their evidence was in conflict with Iannuzzi's with respect to what he said to the respondent's employees prior to signing them to membership in the applicant. Carnevale and Rotondo were direct in replying to questions. Their answers were adequate to the questions posed, although sometimes brief. Their individual testimony was internally consistent and reasonably consistent as between their descriptions of the central and collateral events. Iannuzzi by contrast was evasive at times or answered with generalizations which did not stand up when he was pressed for direct answers or required to be more specific in his testimony. The detail with which he described his visit to the respondent's job site and his conversation with the employees prior to having them sign membership applications varied from examination-in-chief to cross-examination beyond what the Board would expect merely because of the different manner in which the questions were put. Whether these two aspects of Iannuzzi's testimony were the result of the quality of his recall or intentional, the Board is not prepared to rely on his evidence where it conflicts with that of Carnevale and Rotondo with respect to what

Iannuzzi said to the respondent's employees prior to signing them to membership in the applicant.

16. The Board finds, therefore, that Iannuzzi did tell the respondent's employees that they were working on a commercial job and, unless they became members of the applicant, they would not be allowed to continue to work on the job. Furthermore, while Iannuzzi did not tell the employees that he had been sent to the project by their employer, he did preface his statements about the job being a commercial one by a reference, audible to all of the employees, to having spoken to their employer, Fontana, the night before.

17. It is patent that those findings of fact do not substantiate the particulars alleged in the interventions that Iannuzzi had told the employees he had been sent to the job site by Fontana with instructions from him that all employees must sign membership cards for the applicant. Applicant counsel chose not to make an issue of the difference between the evidence tendered in the hearing and those particulars until he was arguing the merits of the challenge to the membership evidence. He took the position then that the discrepancy between the evidence tendered and those particulars was fatal to the interveners' challenge on any one of three grounds. First, on the ground that the interveners' had not proved their allegation that the applicant's membership was unreliable and it should be dismissed. Second, the interveners became aware of the discrepancy between the particulars alleged and the evidence which would be tendered by Carnevale and Rotondo, failed to amend their particulars and in so doing failed to satisfy the requirements of section 72 of the Board's Rules of Procedure with respect to particulars. Third, if counsel for the interveners was caught by surprise by the evidence tendered, the Board should not accept as credible the evidence of those two witnesses.

18. Insofar as the personal credibility of Carnevale and Rotondo is concerned, the Board has already dealt with that above. They cannot be held accountable as witnesses for the fact that the interveners described the specific particulars at issue in a manner inconsistent with the evidence tendered by the witnesses. There are several possible scenarios which might give rise to that discrepancy. For example, Carnevale and Rotondo could have been mistaken in the evidence they gave at the hearing or could have fabricated it. Or they could have related to Lotito the same story as they told the Board but he either misunderstood or misrepresented it to the interveners' solicitors. Obviously, if there was proof of the first scenario that would discredit entirely the evidence of the two witnesses. It would be wrong in the Board's view, however to infer that result when clearly the discrepancy between the evidence tendered and the particulars could have arisen out of a variety of circumstances, not attributable to Carnevale and Rotondo. The simple fact that their viva voce evidence differed from the specific statement of particulars, is not reason enough to discredit their testimony.

19. While the evidence tendered in the hearing did not substantiate the specific particulars about Iannuzzi's alleged statement to the employees, the original allegation still particularizes the material facts that the membership evidence was obtained as a result of a threat made by "...Tony Iannuzzi ('Iannuzzi') on or about February 25, 1983 at approximately 7:30 a.m., when he arrived at the job....". Section 72 requires a statement of the material facts on which the party making the allegation intends to rely in support of its allegation but it does not require the evidence by which those facts are to be proven. In the Board's view, the objection of applicant counsel to the interveners' evidence stems from the fact that the interveners filed more particulars than was required of them by section 72 of the Board's Rules

of Procedure and the Board should not penalize the interveners because they have done so. Therefore, that argument of applicant counsel cannot succeed.

20. Membership evidence is the principal evidence in a certification proceeding. It is in the nature of documentary hearsay and, in order not to disclose the identity of the persons on whose behalf it has been tendered, the evidence is not subjected to cross-examination. Therefore the Board has always required that it be free of any taint. Where taint is alleged because of the conduct and representations made during the course of soliciting the membership evidence, the Board has a two-fold concern with respect to the nature of the conduct and representations. First, the Board must be satisfied that the applicant, through its representatives and supporters, has not engaged in conduct which violates the Act, particularly section 70. Second, the Board must be satisfied that the membership evidence was not obtained by procedural irregularities or misrepresentation. See *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288.

21. In view of that nature of the Board's concern, its practice over many years has been not to give any weight to membership evidence where it has been obtained by threats of loss of employment. It is well-established in the Board's jurisprudence that a threat of loss of job is intimidation contrary to section 70 of the Act. See *L. M. Welter Limited*, [1965] OLRB Rep. April 34 and *Intermodal Marine Surveys Ltd.*, [1979] OLRB Rep. April 321.

22. The Board in the instant case has before it the unqualified threat made a paid, full-time business representative of the applicant that the respondent's employees could not work on the job where they were already employed if they did not become members of the applicant by applying for membership. In the light of Carnevale's and Rotondo's evidence about their knowledge of concrete forming construction, it was reasonable for them, in the Board's view, to believe what Iannuzzi was saying. While Iannuzzi did not tell them and the other employees that their boss, Fontana, had instructed that they sign membership cards, he did use Fontana's name in a manner and at a time in his conversation which would infer he was there with Fontana's knowledge, if not with his blessing. While that use of Fontana's name might add weight and substance to the threat, the threat alone is sufficient in the Board's view to offend the section 70 prohibition against intimidation and coercion. Therefore the Board will give no weight to the membership evidence tendered by the applicant in this application for certification.

23. In the result, this application is dismissed.

0191-83-M International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, Applicant, v. **Tri-Con Mechanical (Sarnia) Limited**, Tri-Con Mechanical Holdings Limited, Respondents

Construction Industry Grievance – Practice and Procedure – Related Employer – Sale of a Business – Applicant writing to Board after grievance filed merely indicating intention to rely on sale and related employer provisions – Board sending copies of letter to respondents – But unable to provide usual forms and information to respondents and employees – Respondents not appearing at hearing – Applicant submitting corporate documents for each respondent – Not sufficient to support either declaration – Failure to appear by respondents not causing Board to make declaration – Adjournment to enable proper filing of sale and related employer applications

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members R. J. Swenor and P. V. Grasso.

APPEARANCES: *David Starkman and Dick Van Gyzen for the applicant; no one for the respondents.*

DECISION OF THE BOARD; December 20, 1983

1. This is an application pursuant to section 124 of the *Labour Relations Act* referring to us a grievance dated April 19, 1983, which alleges that the respondents failed to remit certain reports and amounts pursuant to Articles 10, 30 and 31.2 of two collective agreements binding on the applicant and respondents. The collective agreements relied on are the provincial agreements between the Ontario Erectors Association and the International Association of Bridge, Structural and Ornamental Ironworkers and The Ironworkers District Council of Ontario comprised of Local Unions 700, 721, 736, 759, 765 and 786 for May 1, 1982 to April 30, 1984, (hereinafter referred to as the “1982/84 provincial agreement”) and for May 1, 1980 to April 30, 1982 (hereinafter referred to as the “1980/82 provincial agreement”).

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3. This application was lodged on April 27, 1983. At that time there was no application for relief under either section 1(4) or section 63 of the Act. A hearing in this matter was set for May 11, 1983. On May 10, 1983 the Registrar received a letter from the solicitors for the applicant advising that the applicant “will be making application to the Board pursuant to the provisions of section 1(4)” of the Act. Enclosed with this letter were copies of corporate searches in connection with the respondents. Subsequently, the hearing of May 11th was adjourned. The applicant’s solicitors, by letter dated May 18, 1983, confirmed that the May 11th hearing was adjourned because the respondents may not have had time to receive notice of the applicant’s intention to rely on section 1(4) in the context of its section 124 application. The applicant also indicated that it would also be relying on section 63 of the Act. No particularization of the basis for this application was made at this time or subsequently. The Registrar forwarded to the respondents copies of both these letters.

4. In connection with its section 1(4) and section 63 applications, the applicant did not file either of the appropriate Forms for making such applications included in the Board’s Regulations, i.e., Form 26 for a section 63 application and Form 31 for a section 1(4) application.

Consequently, the Registrar did not create or forward to the respondents either of the Forms giving formal notice to the respondents and their employees of a section 63 application (Forms 27 and 28), and did not create or forward to the respondents either of the Forms giving formal notice to the respondents and their employees of a section 1(4) application (Forms 32 and 33). Forms 27, 28, 32 and 33 could not be sent because the Registrar did not have the information which would have been submitted on Forms 26 and 31. The letters of May 10th and 18th simply indicated an intention to raise section 1(4) and section 63 applications and forwarded copies of corporate searches.

5. The rescheduled date for hearing in this matter was set for November 14, 1983. Notice of this was duly given to all interested parties by the Registrar by letter dated October 19, 1983. Neither of the respondents appeared at the hearing of November 14, 1983. The applicant submitted two batches of corporate returns, certified by the Controller of Records for the Companies Services Branch of the Ministry of Consumer and Commercial Relations, one batch for each respondent. This was the only evidence led by the applicant to support its section 1(4) and section 63 applications. The applicant argued that this was sufficient for the Board to exercise its discretion under section 1(4). The applicant argued in the alternative that if the evidence was insufficient under either section 1(4) or section 63, this occurred because of the respondents' failure to fulfill their statutory obligation under section 1(5) and section 63(13), both of which impose an obligation on the respondents to adduce all material facts within their knowledge. The applicant ought not to fail because of such non-attendance. Alternatively, if such attendance is necessary in order for the Board to decide, then the Board ought to subpoena the respondents, on its own motion, and pay the conduct money for them together with costs of the day for the applicant.

6. The Board has determined that both the section 1(4) and section 63 applications ought to be adjourned in order for the appropriate notification to be given to the respondents and their employees. Even assuming the notice the respondents received via the applicant's letters of May 10th and 18th were sufficient to properly indicate to the respondents the nature of the applications and the particulars in support thereof (both of which we doubt), it is clear that the appropriate notice was not given to the employees of either respondent in accordance with the Board's procedures. These procedures were designed to inform all those interested in the applications to receive notice of their right to attend the hearing and make representations. The employees of the respondents are considered in the Board's regulation to be interested in these proceedings and this notification must be given prior to a hearing.

7. The applicant's counsel argued that the Board has allowed section 1(4) and section 63 applications to be raised by letter and it would be unfair to change this practice without notification. In the alternative, the applicant claimed that appropriate notice has been given to the respondents because the key corporate returns were included in the section 124 application and the May 10, 1983 letter. We disagree that there has been a uniform practice of allowing every section 1(4) and section 63 application raised by letter to be pursued. The Board's Rules of Procedure are quite specific with respect to the making of applications under sections 63 and 1(4). Sections 23 and 27 provide:

23. An application under section 63 of the Act shall be made in quadruplicate in Form 26.

27. An application under subsection 1(4) of the Act shall be made in quadruplicate in Form 31.

Obviously, if the letter contains all the information the Registrar needs to process the applications and create the notices to the respondents and their employees, the applications may proceed. However, where the letter in which these applications are raised falls short of this and the appropriate notices cannot be given, the applicant is always at risk of either having its application dismissed or suffering an adjournment for failure to supply particulars. However, if there is no complaint raised by those attending a hearing as to the manner in which the applications were commenced, the particulars provided or the adequacy of the notice, the hearing may proceed. In the instance before us we are concerned, in the absence of the respondents and in view of the way in which the section 1(4) and section 63 applications were raised, as to whether the respondents have received proper notice. We are convinced their employees have not the notice contemplated by the Board's regulations. For all these reasons we hereby adjourn both applications to allow the applicant to properly file its applications in the proper form in order for the Registrar to give the necessary notices in the circumstances.

(Paragraphs 8-12 dealing with the merits of the grievance omitted)

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13. The applications pursuant to section 1(4) and section 63 are adjourned, pending the applicant providing to the Registrar the required particulars relating to these applications so that the appropriate notices may be given.

1683-83-U Energy and Chemical Workers Union, C.L.C., Complainant, v. United Cement, Lime, Gypsum and Allied Workers International Union, A.F.L.-C.I.O.-C.L.C., Respondent

Unfair Labour Practice – Complainant union engaged in displacement campaign – Incumbent union posting notice threatening dismissal from membership of anyone signing for complainant union – Not intimidation or coercion in absence of threat of loss of employment

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: Daniel Ublansky, Donald Burshaw and Eric Batten for the complainant; Ross Seaman, Sidney Huizenga and Douglas G. Pitt for the respondent.

DECISION OF THE BOARD; December 5, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act* in which it is alleged that the respondent union breached sections 3 and 70 of the Act when it posted a notice on the union bulletin board at the premises of Lake Ontario Cement Limited, Picton, Ontario, where it holds bargaining rights which advised that any members “actively engaged

in the distributing and signing of cards for the Energy and Chemical Workers Union'' could be charged under the constitution.

2. Section 3 of the Act provides:

Every person is free to join a trade union of his own choice and to participate in its lawful activities.

Section 70 of the Act provides:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

3. The evidence is that the complainant, Energy and Chemical Workers Union, began to make contact with the bargaining unit employees of Lake Ontario Cement at Picton in the summer of 1982 for the purpose of laying the groundwork for a displacement application for certification. The Energy and Chemical Workers Union actively commenced to sign the employees of Lake Ontario Cement at Picton into membership in early September, 1983 and the evidence is that by October 19, 1983 approximately 85 of the 170 bargaining unit employees then working had been signed into membership. Mr. Don Burshaw, a former Vice-President of the United Cement, Lime, Gypsum and Allied Workers International Union, was in charge of the organizing drive of the Energy and Chemical Workers Union and had established a four-man in-plant organizing committee. The evidence of Mr. Burshaw and the two members of the in-plant organizing committee who testified is that the organizing drive had been well received by the employees of Lake Ontario Cement at Picton.

4. It is their evidence that the mood changed from October 19, 1983 and that from that date forward the organizing efforts of the Energy and Chemical Workers Union fell on deaf ears. They attributed this change to the posting of the notice by the United Cement, Lime, Gypsum and Allied Workers International Union which is the subject matter of this complaint. The notice reads:

BROTHERS!!

It has come to the attention of the Executive of Local 387 that there are members of this Local actively engaged in the distributing and signing of cards for the Energy and Chemical Workers Union. This is contrary to the by-laws of the United Cement, Lime, Gypsum and Allied Workers International Union, which states as follows:

“Article 20 – Section 5 – Offenses

The following shall be considered offenses against the laws, regulations and practices of this International Union and subordinate bodies, and subject the offender to penalty upon conviction thereof under the provisions of this Article:

S.S(2) Advocating or attempting to bring about a withdrawal from the International Union of any district council, local union or any member or group of members.”

THIS PRACTICE MUST CEASE IMMEDIATELY

or the Executive of Local 387 will be left no alternative but to charge those involved.

It is also to be observed that the United Cement Lime, Gypsum and Allied Workers International Union conducted a general membership meeting on October 20, 1983 for the purpose of discussing the raid by the rival Energy and Chemical Workers Union.

5. The collective agreement in effect at all relevant times and covering the employees of Lake Ontario Cement in Picton makes membership in the United Cement, Lime, Gypsum and Allied Workers International Union a condition of employment.

6. The Energy and Chemical Workers Union, in laying the groundwork for the organizing drive which it commenced in September, 1983, mailed a notice to the homes of all the bargaining unit employees of Lake Ontario Cement at Picton which is dated August 24, 1982. The relevant portion of that notice is reproduced below:

Dear Fellow Trade Unionists:

Some of the fears expressed by many workers during our organizing campaigns centre around two areas which I shall cover in this letter.

I want to point out to each of you that the Ontario Labour Relations Act is the law that governs labour relations in the Province of Ontario. *This law supercedes any Union's Constitution* and I want to make it abundantly clear, regardless of what your Constitution may state, *the law prevails*.

The law states, under section 3, that every person is free to join a Trade Union of his own choice, and to participate in its lawful activities. I want to emphasize this freedom that you, as workers, have the right to join a Trade Union of your *own choice*.

Section 46, subsection 1 of the Ontario Labour Relations Act is of the utmost importance, which states:

- (1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in its provisions,
 - (a) for requiring, as a condition of employment, membership in the Trade Union that is a party to or is bound by the agreement or granting a preference of employment to members of the Trade Union, or requiring the payment of dues or contributions to the Trade Union;”

I want to explain this to you. This means that it's not against the law to include into a collective agreement, a Union Shop provision requiring employees to join the Union. However there are certain conditions that the law stipulates which are as follows:

“Subsection (2) “No trade union that is a party to a collective agreement containing a provision mentioned in clause (1) (a) (Union Shop), shall require the employer to discharge an employee because

- (a) he has been expelled or suspended from membership in the trade union; or
- (b) membership in the trade union has been denied to or withheld from the employee, for the reason that the employee,
- (c) was or is a member of another trade union;
- (d) has engaged in activity against the trade union or on behalf of another trade union;
- (e) has engaged in reasonable dissent within the trade union;
- (f) has been discriminated against by the trade union in the application of its membership rules; or
- (g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable.”

What the law is saying is that regardless of whether there is a Union Shop requiring you to join the United Cement, Lime, Gypsum and Allied Workers International Union, under section (3), you as a worker have the freedom to join the Canadian Cement, Lime and Gypsum Workers Council of the Energy and Chemical Workers Union and there's nothing the International Union can do about it.

You, as a worker, have the right, under law, to join the Canadian Cement, Lime and Gypsum Workers Council of the ECWU, which is covered under subsection (2)(c) of section 46.

You have the right under law, to get involved with the Canadian Cement, Lime and Gypsum Workers Council of the ECWU to speak your mind and to even sign your fellow workers into becoming members of the Canadian Cement, Lime and Gypsum Workers Council of the Energy and Chemical Workers Union.

You have the right to voice your opinions and dissent against the International Union and if you were to be expelled or suspended from membership in the United Cement, Lime, Gypsum and Allied Workers International Union for such lawful activities, your employer could not

discharge you, under section 46, subsection (2), and the Energy and Chemical Workers Union could file unfair labour charges with the Ontario Labour Relations Board, that you have been expelled or suspended for exercising your rights under the law.

(emphasis added)

7. The submissions of the complainant, Energy and Chemical Workers Union, may be summarized as follows: The complainant argues that there are two elements required to establish a breach of section 70 of the Act; an intention to coerce or intimidate within the meaning of the section and the carrying out of intimidatory or coercive conduct. The complainant argues that where, as in this case, a notice of the type before us is posted during the course of a rival union's organizing campaign and in the face of a subsisting collective agreement under which continued membership in the incumbent trade union is a contention of employment, it must be found that both of the preconditions necessary to support a finding under the section exist. More specifically, it is argued that it must be found that the purpose of the posting of the notice is to cause employees to refrain from signing into membership in the complainant out of a fear that to do so could jeopardize their continued employment. The complainant relies on the sudden difficulty it experienced in signing employees into membership following the posting of the notice in support of the position that the notice has had the desired effect. The complainant asks the Board to find that the posting of the notice in question constitutes a threat to the continued employment of anyone who signed a card in support of it, and that it had this effect and therefore, constitutes intimidation within the meaning of section 70 of the Act. *Terry Matus and International Longshoremen's Union, Local 502*, March 6, 1981, 37 di, a decision of the Canada Labour Relations Board, is cited in support of the position advanced by the complainant.

8. The respondent union, which did not call any evidence, argues simply that the notice was not posted for the purpose of intimidating anyone from exercising rights under the Act and furthermore, that it cannot be read as threatening anyone's employment, nor, on the evidence, did it have this effect.

9. A concise description of the scope of section 70 of the Act is contained at para. 59 of the *Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781 as follows:

59. Section 70 of the Act prohibits any interference with the rights of individuals under the Act amounting to compulsion by means of intimidation or coercion. Without exhaustively defining the meaning of those terms it appears to the Board that at a minimum they must relate to conduct which, directly or indirectly deprives an individual of his free choice in the exercise of his rights under the Act. While that might include acts or threats which are physical or economic, the section is aimed at preventing interference with an individual's rights by some form of pressure or force that removes their ability to choose. (*Tim Reay*, [1982] OLRB Rep. Aug. 1206; *Beatrice Foods (Ontario) Ltd.*, [1982] OLRB Rep. Apr. 519; *Purple Heart Film Corp.*, [1979] OLRB Rep. Sept. 900; *Great Lakes Forest Products*, [1979] OLRB Rep. July 651; *International Marine Surveys Ltd.*, [1979] OLRB Rep. Apr. 321; *Innovative Wood Products*, [1978] OLRB Rep. Feb. 161; *Alex Henry and Son Ltd.*, [1977]

OLRB Rep. May 288; *A. Greco*, [1976] OLRB Rep. June 323; *Andrew Warren*, [1976] OLRB Rep. Jan. 963; *Canadian Textile and Chemical Union*, [1971] OLRB Rep. Aug. 469.

10. In this case the complainant argues that what we are faced with when the notice is read in conjunction with the union security clause in the collective agreement between the company and the respondent union is a threat to employment conditional upon supporting the complainant union which constitutes intimidation within the meaning of the section. However, there is no express threat to employment contained in the notice. The notice does not expressly tie any action which might be taken by the incumbent union to a possible loss of employment. Given the provisions of section 46(2) of the Act this is not surprising. Section 46(2) (a), (b), (c) and (d) provides as follows:

46. (2) No trade union that is a party to a collective agreement containing a provision mentioned in clause (1)(a) shall require the employer to discharge an employee because,

(a) he has been expelled or suspended from membership in the trade union; or

(b) membership in the trade union has been denied to or withheld from the employee,

for the reason that the employee,

(c) was or is a member of another trade union;

(d) has engaged in activity against the trade union or on behalf of another trade union.

The continued employment of a person expelled from union membership for engaging in activity on behalf of another trade union is protected. The United Cement, Lime, Gypsum and Allied Workers International Union, therefore, could not have brought about the termination of employment of its members who supported the rival Energy and Chemical Workers union even if it so desired. Furthermore, the evidence establishes that employees in the bargaining unit were advised of their legal rights in this regard, in the August 24, 1982 notice mailed to the homes of all bargaining unit employees by the Energy and Chemical Workers Union. In the absence of any reference to job security in the impugned notice, in the face of section 46(2) of the Act and in the face of the August, 1982 notice from the Energy and Chemical Workers Union advising the affected employees of the protection afforded under section 46(2) of the Act, we are unable to conclude that the notice threatened or was intended to threaten the employment of anyone. We make this finding notwithstanding the difficulty which the Energy and Chemical Workers Union encountered in signing employees into membership, following both the posting of the notice and the holding of the October 20th membership meeting by the United Cement, Lime, Gypsum and Allied Workers International Union.

11. In the absence of sufficient evidence to support a finding that the notice was intended to or threatened employment, the threat of expulsion from membership of those who support the Energy and Chemical Workers Union, which is clearly the message conveyed by

the notice, does not constitute intimidation or coercion within the meaning of section 70 of the Act. While an attempt by a union to threaten the employment of anyone supporting a rival union would constitute a clear case of intimidation or coercion within the meaning of section 70 of the Act, it is envisaged under section 46(2) of the Act that employees who are members of an incumbent union and at the same time support or become members of another union may be liable for expulsion from membership in the incumbent union. If expulsion from membership in these circumstances constituted intimidation or coercion within the meaning of section 70 of the Act there would have been no need to provide the employment protections which are provided in section 46(2) of the Act. The Legislature has provided employment protection in these circumstances because it does not consider the expulsion from membership of an employee who supports a rival union, absent any attempt to tie the expulsion from membership to a loss of employment, to constitute intimidation or coercion within the meaning of section 70 of the Act. An employee is always free to exercise his right under section 3 and section 70 of the Act to support or join a rival union but in the face of the system of exclusive representation that is established under the Act, he does so in the knowledge that he is rejecting the incumbent union and may be expelled from membership in it.

12. The *Terry Matus* decision, *supra* of the Canada Labour Relations Board stands for the proposition that the Canada Labour Relations Board has the authority to provide redress to individuals who have been deprived of employment through the enforcement of a discriminatory internal union rule. More specifically, the Canada Board enforced a statutory provision similar to section 46(2) of the *Ontario Labour Relations Act* in circumstances which are not at all analogous to those that are before us. The case does not assist the complainant in this matter.

13. Having regard to all of the foregoing, this matter is hereby dismissed

1556-79-M; 1397-81-M The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **West York Construction Ltd.**, Respondent, v. Van Bots Construction, Respondent, v. General Contractors Section of the Toronto Construction Association, Intervener, v. Metropolitan Toronto Apartment Builders Association, Intervener, v. Ontario Form Work Association, Intervener, v. Labourers International Union of North America, Local 183, Intervener.

Construction Industry – Practice and Procedure – Whether projects coming within ICI or residential sectors – Sector determination where mixed – use buildings – Estoppel not applying to statutory sector concept – Board willing to give weight to local area practice and definition of “residential apartment” in collective agreement in proper circumstances – Both projects in question found to be residential

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. A. Ronson and H. Kobryn.

APPEARANCES: Douglas J. Wray, Fred J. Leach and Joseph Campbell for the applicant; S. C. Bernardo and A. Kunz for West York Construction; S. C. Bernardo and Dan Van Leeuwen for Van Bots Construction; Bruce Binning for the General Contractors Section of the Toronto Construction Association; Bruce Binning and Karl Mallette for the Metropolitan Toronto Apartment Builders Association; Jeffrey L. Davies and Tony Michael for the Ontario Form Work Association; S.B.D. Wahl and C. DeToni for Labourers' International Union of North America, Local 183.

DECISION OF IAN C. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; December 19, 1983

1. These proceedings arise out of two applications to the Board under section 150 of the *Labour Relations Act* wherein the Board is asked to determine whether two separate projects, both now completed, came within the industrial, commercial and institutional sector (the “ICI sector”) of the construction industry. It is common ground that if the two projects did not fall within the ICI sector, they came within the residential sector. Although both projects are now completed, the sector issue remains relevant to the merits of certain grievances filed by the Carpenters District Council of Toronto and Vicinity. The Carpenters' District Council takes the position that both projects were within the ICI sector. All of the other parties, however, contend that the projects came within the residential sector.

2. The Act nowhere expressly defines what is meant by the terms “residential sector” and “ICI sector”. Reference to the various sectors is, however, found in section 117(e). The provisions of both section 117(e) and section 150 are set out below:

“117(e) ‘sector’ means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains

sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.”

“150. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers’ organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).”

3. The idea that the construction industry is divided into different divisions or sectors originally developed independently of any provisions in the *Labour Relations Act*. Instead, the different sectors evolved as a result of employer associations and trade unions entering into separate collective agreements covering particular types of construction work. The lines separating the different types of work or sectors evolved primarily on the basis of common understandings, and to the extent they were written down, it tended to be only in collective agreements negotiated between the various unions and employer associations. In 1971 the Act was amended to reinforce the bargaining position of employer associations by permitting the Board to “accredit” them as the statutory bargaining agent for employers, whether members of the employer association or not. In that many employer associations tended to be active only in a particular geographic area, and in one or, at most, a relatively small number of sectors, the accreditation provisions of the Act specified that the Board could accredit an employers’ association by reference to a geographic area and by reference to one or more sectors (The current provision in this regard is set out in section 126 of the Act). So as to explain what it meant by the term sector, coincidental with the enactment of the accreditation provisions in the Act, the Legislature enacted what is now section 117(e). In setting out the various sectors, the legislation referred to the residential and ICI sectors as being separate sectors, a move which recognized, and likely hastened, an already existing trend towards treating “building construction” differently on the basis of whether it is residential or ICI. In 1978 the Legislature amended the Act so as to consolidate bargaining structures in the ICI sector on a province-wide basis, and to stipulate that, with certain exceptions, the only agreements which could apply to ICI work were the provincial agreements referred to in section 137(1)(e). This amendment gave increased importance to the concept of sectors, and to the issue of determining exactly what work came within the ICI sector. We do not believe, however, that by giving statutory recognition to the concept of different sectors and by enacting special provisions with respect to the ICI sector, the Legislature thereby intended to change the existing understandings between trade unions and employers concerning the scope of the different sectors.

4. The two projects with which we are concerned can be summarized fairly quickly. One of the projects involved the construction of a nineteen level building built for, and on land owned by, the Hospital for Sick Children in Toronto. The building is located approximately one block from the Hospital itself. The eighth to nineteenth levels of the building contain 119 self-contained apartment units. The first and second levels are parking garages for use by the occupants of the apartment units. The third to seventh levels are also parking garages but for use by the general public. Although no evidence was led on point, given the proximity of the building to the Hospital proper, it is reasonable to infer that the public parking garages will primarily be used by staff and visitors to the Hospital. There is a sharp disagreement between the parties as to how the self-contained apartment units should properly be characterized. The Carpenters’ District Council characterizes this portion of the building

as a "staff residence", whereas the other parties contend that the apartment units are open to the general public. Unfortunately, no one from the Hospital was called as a witness to explain the Hospital's rationale for building the apartment units, or how they have in fact been utilized. The evidence we do have with respect to these matters is very limited. The architects plans, which were filed as an exhibit on agreement of the parties, refer to the building as a "staff residence and parking garage for the Hospital for Sick Children". However, Mr. Van Leeuwen, who at the relevant time was a senior officer with Van Bots Construction ("Van Bots"), the general contractor on the project, indicated that the matter was not quite that simple. According to Mr. Van Leeuwen, the apartments are to be leased through A. E. LePage acting as property manager and rental agent. Preference for the apartments is to be given to medical doctors serving their periods of residency at the Hospital, but any apartments not taken up by these doctors are to be leased to the general public. According to Mr. Van Leeuwen, any doctors who do occupy the apartments will be charged the same rent as the general public.

5. The second project involved the construction of a building on the campus of the Salvation Army Training Centre in Toronto. The building has two floors and a basement. On the second floor of the building there are five self-contained apartments to be used by persons attending the Salvation Army Training Centre as well as their families. In the basement are rooms holding mechanical and electrical equipment, as well as a laundry room and a wash-room. Also located in the basement is a large playroom. It is the understanding of Mr. Kunst, the president of the project's general contractor, West York Construction Ltd. ("West York"), that this playroom is for the use of children resident in the building. Part of the first floor of the building is taken up by a small lounge and office. However, the greatest part of the space on the first floor is given over to three additional large playrooms. It is the understanding of Mr. Kunst that these playrooms are for the use of children living in other buildings on the Salvation Army Training Centre campus, but that none of the playrooms are to be used for a licensed day care center.

6. The dispute between the parties arises primarily out of the manner in which the concrete forming work was performed on the two projects. In both instances, all of the forming and related concrete work was performed by members of Labourers' International Union of North America, Local 183 ("Local 183"). In the case of the project for the Hospital, members of Local 183 were employed directly by Van Bots to perform the work. On the Salvation Army project the Local 183 members were employed by Rili Brother Forming Ltd. a concrete forming contractor to which West York had sublet the work. On both projects, members of Local 183 built and repaired the forms used to take the concrete. Local 183 members also placed the iron rods used to reinforce the concrete, poured the concrete and then did the related cement finishing work. In addition, all of the associated general labouring work was performed by Local 183 members. The grievances filed by the Carpenters' District Council reflect the claim that the projects in question fell within the ICI sector and that pursuant to the terms of the provincial agreement covering carpenters employed in the ICI sector, all of the carpentry work associated with building and repairing the forms should have been performed by members of the United Brotherhood of Carpenters and Joiners of America. Given that a central issue with respect to both grievances was whether the work in question actually came within the ICI sector, both grievances were adjourned so as to allow the Board to deal with the sector issue pursuant to the provisions of section 150 of the Act.

7. The Board heard considerable evidence with respect to the history of concrete forming in the Toronto area. In the unionized portion of the ICI sector, concrete forming has generally been performed by members of a number of different trades. The forms themselves are built and repaired by carpenters belonging to the United Brotherhood of Carpenters and Joiners of America. The reinforcing rods are installed by rodmen belonging to the International Association of Bridge, Structural and Ornamental Ironworkers. All of the labouring work on a project, including the pouring of the concrete, is performed by members of the Labourers' International Union of North America, Local 506, which is a "sister local" of Local 183. The finishing work on the concrete is performed by cement masons belonging to the Operative Plasterers' and Cement Masons' International Association of the United States and Canada.

8. Historically, wooden forms built to take a concrete pour were disassembled after a pour and then re-built for the next pour. In the 1960's, however, there was a great increase in the construction of concrete high-rise apartment buildings in the Toronto area. Because of the repetitive nature of the buildings and the fairly short spans between vertical walls, residential concrete forming firms developed a procedure by which they could re-use the same forms. The forms were moved intact from one location on a building to another by way of a crane. The movement of the forms by a crane became referred to as "flying" the forms, and the forms themselves became known as "flying forms". The use of flying forms greatly increased the speed of construction and also lowered the costs associated with the construction of high-rise apartment buildings. Because of the nature of most ICI projects, generally they have not been amenable to the use of flying forms. However, as a result of certain technological advances, there is now a growing use of flying forms in ICI sector concrete forming.

9. Initially, in the Toronto area concrete forming work on high-rise apartment buildings was performed on a non-union basis. The non-union employees who performed the work tended to work as a single "gang" or "crew", and while an individual employee might be particularly proficient in one aspect of the work, when not engaged in his speciality he would work on other aspects of the work as well.

10. In the mid-1960's there were a number of attempts to organize employees in the residential concrete forming field. One of these attempts involved the formation of a council of unions known as the Council of Concrete Forming Trades Unions comprised of locals of the Carpenters, Cement Masons, Ironworkers and Labourers Unions, as well as Local 793 of the International Union of Operating Engineers. The Operating Engineers Union is a trade union that represents crane operators and its involvement in the Council reflects the fact that flying forms are actually "flown" by a crane. The Council of Concrete Forming Trades Unions proved to have no lasting organizing success. A more lasting organizing effort, however, was undertaken by Local 183. Local 183's approach involved taking into membership all employees engaged in concrete forming except the crane operators. In 1977 an association of concrete forming companies known as the Ontario Form Work Association entered into a collective agreement with Local 183 covering "all construction employees" employed by its member companies with the exception of crane operators represented by Local 793 of the Operating Engineers Union. Local 183 and Operating Engineers Local 793 subsequently entered into a council of unions known as the Form Work Council of Ontario. In 1979 this council entered into a collective agreement with the Ontario Form Work Association covering "all construction employees" of the forming companies belonging to the Association. Under this agreement, the crane operators were required to be members of Operating Engineers Local 793, while all other employees belonged to Local 183. Renewal agreements between the

same two parties was entered into in 1981 and 1983. Although these agreements did not purport to limit their applicability to any one sector, the forming contractors belonging to the Ontario Form Work Association have generally performed the majority of their work in the residential sector. Further, we gather that the great majority of firms engaged in high-rise residential concrete forming in the Toronto area are either bound by this agreement, or by separate but similar agreements. As already noted, on the Salvation Army project the concrete forming work was subcontracted to Rili Brother Forming Ltd. This firm is a member of the Ontario Form Work Association and is bound to the collective agreement with the Form Work Council of Ontario. On the project built for the Hospital, Van Bots did its own forming work. Van Bots is not a member of the Ontario Form Work Association. However, on September 26, 1977 Van Bots and Local 183 entered into an agreement whereby Van Bots agreed to apply the terms of the then current agreement between the Form Work Council of Ontario and the Ontario Form Work Association, as well as the terms of subsequent agreements between the same parties.

11. For their part, the major apartment builders in the Toronto area have grouped themselves into an association known as the Metropolitan Toronto Apartment Builders Association (the "MTABA"). In May of 1970 the MTABA entered into a collective agreement with Local 183. On November 28, 1975 the then current agreement between Local 183 and the MTABA was amended so as to require that members of the MTABA "not ... sublet concrete forming to sub-contractors other than those who are in contractual relationship with the union". It appears that this clause has been included in all subsequent agreements between the same parties. West York is a member of the MTABA. As already noted, on the Salvation Army project, West York sublet the concrete forming work to Rili Brother, a firm bound to Local 183 through the Ontario Form Work Association agreement. Van Bots, the builder of the project for the Hospital, is not a member of the MTABA. However, on July 23, 1976 Van Bots entered into an agreement with Local 183 whereby it agreed to apply the terms of the then existing agreement between Local 183 and the MTABA, as well as to honor the terms of subsequent agreements between the same parties. In this regard, it might be noted that Van Bots is unusual in that it is a developer that does its own forming work. This explains why it has bound itself to the terms of both the MTABA agreement with Local 183 (the developers agreement) as well as the Ontario Form Work Association - Form Work Council of Ontario agreement (the forming contractors agreement).

12. The agreement between the MTABA and Local 183 does not purport to cover IC1 work. The agreement does, however, contain the following fairly wide description of what is a residential apartment building for the purposes of the agreement:

"1.01 Each of the Employers recognize the Union as the Collective Bargaining Agent for all of its own Construction Employees, (whose Classifications fall into a category listed on Schedule "A" attached hereto), engaged in the on-site Construction of all types of Apartment Buildings only and their natural amenities, and without restricting the generality of the foregoing, and for the purposes of clarification, it is agreed that the following building types shall be deemed to be an Apartment Building for the purposes of this Agreement:

(i) *all Public Housing, Co-operatives, Senior Citizens' and Student Housing;*

(ii) a stacked row dwelling, which means a building divided vertically into three or more dwelling units, and horizontally into four or more dwelling units each having its own private entrance;

(iii) a stacked structure which is four storeys or more above grade;

(iv) notwithstanding Items 1.01(i) and 1.01(ii), a traditional three-storey Apartment Building, with common corridors, stairwells and parking;

(v) a separate structure which includes space designed to be used for Commercial, Retail and/or Office purposes of not more than 50 per cent (50%) of the gross floor area (excluding Parking and Recreational facilities);

(vi) those Sections of a multi towered single Complex on a common podium which are divided vertically by lines relating directly to Commercial and Residential Sections; then each Section shall be built according to its base use."

(emphasis added)

13. Local 183 is not the only union with which the MTABA has a bargaining relationship. On September 20, 1969 the MTABA entered into an agreement with the Toronto Building and Construction Trades Council. The Council, now known as the Toronto - Central Ontario Building and Construction Trades Council (the "Construction Trades Council") is a grouping of most of the locals of the various building trades unions in the Toronto area, and includes among its members both Local 183 and the Carpenters District Council of Toronto and Vicinity. The first and subsequent agreements between the MTABA and the Building Trades Council have provided that once a union can establish that a number of conditions have been met with respect to certain work, MTABA members are required to sublet that work only to contractors employing members of the union. However, if the necessary pre-conditions are not met, then MTABA members are free to sublet the work to any contractor they choose. It has generally been the understanding that the MTABA - Building Trades Council agreement applies only to the residential locals of the Building Trades Unions. In instances where the same local of a Building Trades Council affiliate represents employees in both the residential and ICI sectors, but with different wage rates and other conditions of employment, the residential wage rates and terms have generally been regarded as applicable. The 1969 MTABA - Building Trades agreement expressly excluded concrete forming from its scope, although as already noted, in 1975 the MTABA entered into a separate agreement with Local 183 which expressly dealt with concrete forming. It is of some interest that originally no locals of the Carpenters Union were regarded as meeting the requirements to be insured that work would be sublet by MTABA Developers to firms employing members of the union. However, on July 5, 1973 the MTABA and the Building Trades Council agreed that Carpenters Local 1190, a residential local affiliated to the Carpenters District Council of Toronto and Vicinity, met the requirements to be insured that trim carpentry work be sublet only to firms employing its members. Concrete forming and the installation of forms was expressly excluded from this arrangement.

14. The original 1969 agreement between the MTABA and the Building Trades Council referred to the work which it covered in the following terms:

“1.01 This agreement shall apply to Residential Construction, that is, the on site construction of all types of apartment buildings only and their natural amenities, and shall not apply to commercial, industrial and institutional construction which is tendered through the normal bid depository systems, provided that apartment projects under the Ontario Housing Authority tendered through the normal bid depository system shall be covered; provided however, where a member owns any land directly or indirectly, beneficially or otherwise, upon which he intends to construct a commercial, industrial or institutional building, then the terms and conditions of this agreement, and not the terms and conditions of the commercial Unions, shall apply.”

From this wording, it appears that the initial MTABA – Building Trades agreement applied not only to “apartment buildings” (which term was in no way defined) but also to ICI projects where a member of the MTABA owned the land.

15. On January 23, 1975 the MTABA and the Building Trades Council entered into a second agreement. The scope of this agreement differed in two major respects from that of its predecessor. Firstly, it eliminated any reference to ICI work on land owned by MTABA members. Secondly, for the first time it described what projects were to be included in the term “apartment building” and thus covered by the agreement. The language employed in this regard was almost identical to the language employed in the MTABA – Local 183 agreement. The actual wording of the relevant part of the MTABA – Building Trades agreement read as follows:

“1.01 This agreement shall apply to Residential Construction, that is, the on-site construction of all types of apartment buildings only and their natural amenities, and shall not apply to commercial, industrial and institutional construction. It is understood that the terms and conditions of this agreement, and not the terms and conditions of the Commercial Unions, shall apply.

Without restricting the generality of the foregoing, and for the purposes of clarification, it is agreed that the following building types shall be deemed to be an apartment building for the purposes of this agreement:

(i) *All Public Housing, Co-operatives, Senior Citizens' and Student Housing;*

(ii) a stacked row dwelling, which means a building divided vertically into three or more dwelling units, and horizontally into four or more dwelling units, each having its own private entrance;

(iii) a stacked structure which is four floors or more in height;

(iv) notwithstanding Items (i) and (ii), a traditional three-storey apartment building, with common corridors, stairwells and parking;

(v) *a separate structure which includes space designed to be used for commercial, retail and/or office purposes of not more than 50 per cent (50%) of the gross floor area (excluding parking and recreational facilities);*

(vi) those sections of a multi-towered single complex on a common-podium which are divided vertically by lines relating directly to commercial and residential sections; then each section shall be built according to its base use.”

(emphasis added)

16. Similar language to that set out above has been included in all of the renewals of the MTABA – Building Trades Council agreements. These agreements have also continued to require that MTABA members sublet trim carpentry only to contractors employing members of Carpenters Local 1190. However, there has also been included in subsequent agreements a requirement that MTABA members sublet any caulking and weatherstripping work to firms employing members of Carpenters Local 1747, and the installation of lath, gypsum drywall boards and acoustical ceiling systems to firms employing members of Carpenters Local 675. Form work, however, is still exempted from the agreement’s coverage.

17. Before leaving the subject of bargaining rights, we would note that in 1964 Van Bots signed a “working agreement” with the Toronto Building and Construction Trades Council, and that West York signed a similar agreement in 1967. By virtue of these agreements, both firms agreed to recognize the Building Trades Council and its affiliated unions as the collective bargaining agents of their employees. It is on the basis of these documents that the Carpenters District Council of Toronto and Vicinity, being an affiliate of the Building Trades Council, claim bargaining rights for the two companies. Due to the effect of the provincial bargaining sections of the Act, any bargaining rights held by the Carpenters District Council and its member locals in the ICI sector are now covered by the provincial agreement entered into between the designated carpenter employee and employer bargaining agencies. Earlier we made reference to certain grievances filed by the Carpenters District Council. These grievances were filed against Van Bots and West York and claimed that the two firms had violated the provincial agreements by not employing, or not sub-contracting the work to firms who did employ, carpenters to perform the forming work.

18. The evidence indicates that since the early 1970’s most high-rise apartment construction in the Toronto area has been performed pursuant to the terms of the MTABA – Building Trades Council and MTABA – Local 183 agreements. Pursuant to the MTABA – Local 183 agreement, apartment developers have sublet the concrete forming work to contractors employing Local 183 members. Pursuant to the terms of the agreement between the Ontario Form Work Association and the Form Work Council of Ontario, these contractors have employed members of Local 793 of the Operating Engineers Union to operate the cranes and members of Local 183 to do all of the remaining work, including building the forms, setting the reinforcing rods and pouring and finishing the concrete. Many members of Local 183 are in fact specialized in one aspect of the work, but when an employee’s special skills

are not required, he may perform other types of work, including assisting other members working at their specialties. On low-rise apartment buildings, flying forms may not be used. In these cases, members of Local 183 build the forms and then disassemble them after each pour. As already indicated, in contrast to the procedures utilized in the residential sector, most unionized ICI concrete forming is performed pursuant to the terms of the provincial agreements of the various trades, with members of the carpenters union building and repairing the forms.

19. The parties led considerable evidence concerning how buildings built by institutions for residential purposes, as well as buildings with both residential and commercial uses, have been classified in the Toronto area. The evidence with respect to mixed residential-commercial buildings was by far the more detailed. Prior to the mid- 1970's these types of mixed-use buildings were quite rare in the Toronto area, but since then they have become increasingly common. Indeed, at least one third of all new high-rise apartment buildings have some commercial component. In most instances, the commercial use is restricted to the first one or two floors which are given over to retail stores and/or professional offices. In accordance with the terms of the MTABA - Building Trades Council agreement, these projects have generally been built on a residential basis. There have also been a number of instances where the commercial component has been somewhat more substantial. Again, the description of an apartment building contained in the MTABA - Building Trades Council agreement has generally been applied to determine whether the project was to be constructed on a residential or ICI basis. Highly relevant examples of such mix-use buildings include two projects where a number of levels were constructed as public parking garages to be operated by the City of Toronto parking authority, while the remaining floors were self-contained apartments to be rented out by the City's housing authority. In both cases, the projects were constructed pursuant to the MTABA - Building Trades Council agreement.

20. The evidence indicates that a variety of institutions have become active in the construction of residential apnstitutional buildings and hence constructed as ICI projects. Evidence was led, however, concerning a number of talmost always been built pursuant to the MTABA - Building Trades Council agreement. Many of these projects have involved the construction of buildings by various government bodies so as to provide subsidized or medium - cost rental accommodation to the general public. In addition, a number of ethnic organizations have built similar buildings for use by their members, particularly senior citizens. Here again the projects have generally been built as residential apartment projects in accordance with the terms of the MTABA - Building Trades Council agreement. Unfortunately, very little evidence was led with respect to the manner in which institutions have constructed residential buildings for directly institutional uses. We surmise (although there was no direct evidence on point) that at one time the traditional form of university residences in the Toronto area were considered as institutional buildings and hence constructed as ICI projects. Evidence was led, however, concerning a number of town houses built in 1978 and 1979 as student residences at Erindale College, which is a branch of the University of Toronto located in Mississauga. West York was the general contractor on the project and it sublet the forming work to a forming contractor which employed members of Local 183. It will be recalled that both the MTABA - Local 183 and the MTABA - Building Trades Council agreements expressly include "student housing" as a type of apartment building.

21. It is of some interest that both Van Bots and West York are actively engaged in building ICI buildings using a mix of construction trades on the form work, and that both

also build residential buildings where, apart from the crane operators, all of the concrete forming work is performed by members of Local 183. In bidding on the jobs for the Hospital and for the Salvation Army, both Van Bots and West York bid for the work on the understanding that the projects were residential. Pursuant to the MTABA – Building Trades Council agreement, most sub-contracts on the projects were let to firms employing members of residential locals of the building trades unions (or residential divisions of multi-sector locals) and as permitted under that agreement, some of the work was sublet to non-union firms. As already noted, the concrete forming work on both projects was performed by members of Local 183. Flying forms were utilized on the project for the Hospital, but due to its relatively low height not on the project built for the Salvation Army. The trim carpentry on both jobs was performed by members of Local 1190, a residential local of the Carpenters Union.

22. Before considering which sector the two projects in question actually came within, we would note that no party argued in favour of treating one part of the projects as residential and another part as ICI. Indeed, it appeared to be accepted that such an approach would not be feasible. In this regard, various witnesses referred to problems that would arise in bidding a job and then subletting the work if part was viewed as residential and part as ICI. There would also be difficulties in deciding how to characterize the initial excavation work and installation of underground services. Witnesses from both Van Bots and West York also voiced a concern that if the lower levels of a building were built by an ICI contractor, and the upper floors by a residential contractor, it would be difficult to establish which contractor was responsible for problems which might develop with respect to the upper floors, in that the root of the problem could lie in the manner in which the lower floors were constructed.

23. It is the contention of Van Bots, West York and the MTABA that the Board need not reach any actual conclusion on the merits with respect to which sector the two projects came within. It is their view that the Carpenters District Council is estopped from contending that the description of what constitutes a residential apartment building contained in the MTABA – Toronto Central Ontario Building and Construction Trades Council agreement does not apply. In this regard, they rely on the fact that the Carpenters District Council is a member of the Building Trades Council, and that certain of its locals have taken advantage of the MTABA – Building Trades Council agreement, in particular residential Local 1190 with respect to trim carpentry. They also rely on the fact that the Carpenters District Council acquired its bargaining rights with respect to both West York and Van Bots on the basis of those firms signing a “Working Agreement” with the Building Trades Council. Given these facts, they contend that it simply does not lie in the mouth of the Carpenters District Council to now challenge the description of what constitutes an apartment building agreed to by the Building Trades Council. On a number of occasions the Board has, in fact, applied the principle of estoppel to stop a party from relying on its strict rights under a collective agreement where because of its own prior conduct it would be unfair to let it do so. However, we do not believe that the principle of estoppel can apply to a determination under section 150 of the Act. In this regard it is to be noted that the Act clearly indicates that the ICI sector is to be treated differently from the other sectors of the construction industry. In addition, section 146 stipulates that except for the various provincial agreements, it is not open to employers and trade unions to enter into agreements or arrangements which purport to cover the ICI sector. It follows from this that it is simply not open to parties to seek to contract out of the provisions of the Act relating to the ICI sector by agreeing that certain ICI work does not come within the ICI sector. See: *Quinard Limited* [1982] OLRB Rep. July 1054. Given these

considerations, we are of the view that the Carpenters District Council is not estopped from contending in these proceedings that the two projects came within the ICI sector.

24. Having reached this conclusion, the issue remains as to what weight, if any, should be given to the description of what constitutes an apartment building contained in the MTABA agreements and in particular the agreement between the MTABA and the Building Trades Council, as well as to the practice that has grown up in light of those agreements. The Carpenters District Council takes the position that it would be inappropriate for the Board to look at local area practice or to apply the descriptions of an apartment building contained in the agreements. In this regard, the District Council contends that since agreements and practices differ in different parts of the province, if the Board were to rely on local conditions and agreements, it might possibly end up concluding that a particular type of project falls within the residential sector in the Toronto area, but in the ICI sector in another part of the Province. A number of the other parties, however, strongly contended that local area practice was a reasonable consideration to take into account.

25. Lacking a definition of either the residential or the ICI sector in the Act, the Board is required to determine the dividing line between them with limited statutory guidance. In determining the matter, we incline to the view that as far as reasonably possible our conclusion should be one which takes into account existing industrial relations realities. We would refer in this regard to our earlier expressed view that by incorporating the notion of sectors into the Act, the Legislature did not thereby intend to change the existing understandings between trade unions and employers as to the scope of the different sectors. We recognize that local practices and understandings might vary in different parts of the Province and that our approach has at least the potential for different results in different areas. We also recognize that this might create a number of uncertainties. Nevertheless, we view such a situation as something that both trade unions and employers can accommodate themselves to. Indeed, *if* the result of this approach is that the line separating the residential and ICI sectors is somewhat different in various parts of the Province, it would be precisely because trade unions and employers in different parts of the province have already adopted different approaches to the issue.

26. This is not to say that local area practices or local agreements will always be determinative. Most projects clearly fall within one sector or another, and a local practice or agreement cannot alter that fact. Accordingly, an agreement to regard a clearly ICI project such as a shopping plaza or a school as residential would not find much favour with the Board. Rather, it is only with respect to those relatively small number of projects which fall into the "grey area" between the sectors that a widely accepted local practice or agreement might assist in deciding how the project should be characterized. We would caution, however, it is possible that for one reason or another other relevant factors might be persuasive enough to cause the Board to conclude that a local practice or agreement should not be followed. Each situation will have to be determined on the facts involved.

27. With respect to the Toronto area, an agreement has been reached between the MTABA as the representative of most of the major apartment builders, and the Toronto-Central Ontario Building and Construction Trades Council, a central body of building trades union locals, concerning what constitutes a residential apartment. The evidence indicates that the terms of this agreement have generally been applied throughout the Toronto area in determining whether a particular project comes within the residential or the ICI sector. Indeed,

there was no evidence to show that in recent years any other guideline has been used for this purpose. It is perhaps also worth noting that the General Contractors Section of the Toronto Construction Association, which represents many of the large general contractors engaged in ICI construction, indicated at the hearing that it had no opposition to the terms of the MTABA – Building Trades Council agreement being applied to the projects in question.

28. In these circumstances, we are prepared to give considerable weight to the relevant provisions in the MTABA – Building Trades Council agreement (which provisions are also to be found in almost identical language in the MTABA – Local 183 agreement), as well as the practice that has grown up under that agreement. As already indicated, however, such an agreement can only be persuasive and the Board is under no obligation to follow it.

29. We turn now to specifically consider the project built for the Hospital for Sick Children. As detailed above, the building in question consists of twelve levels of self-contained dwelling units and seven parking levels. Under the following provision in the MTABA – Building Trades Council agreement, the building would appear to be considered an apartment building in that it is:

“a separate structure which includes space designed to be used for commercial, retail, and/or office purposes of not more than 50 per cent (50%) of the gross floor area (excluding parking and recreational facilities.)”

We do not find a test of majority use to be an unreasonable one for this type of mixed-use building, irregardless of the owner. We would also note that as a general proposition we do not regard the exclusion of parking facilities from this type of calculation as necessarily unreasonable, particularly in instances where it might reasonably be assumed that the parking will be used by persons who are in the building in connection with either the building’s residential or commercial uses. In the instant case, however, most of the parking facilities are aimed not at the users of the building, but rather at the general public who might be working at or visiting the Hospital. In this type of situation we are not prepared to exclude from our calculation all of the parking levels. Instead, we propose to exclude only the two underground parking levels which are to be used by the residents of the apartments and treat the remaining five levels of parking as a commercial or institutional use. Nevertheless, in that there are twelve levels of self-contained apartments in the building, it appears that over fifty per cent of the space in the building (excluding parking for the residents) is given over to residential use. In these circumstances, and given the prevailing pattern in the Toronto area of treating such projects as residential, we are satisfied that the project built by Van Bots did in fact come within the residential sector of the construction industry and not within the ICI sector.

30. The parties disagree on whether or not most of the space in the Salvation Army project is residential. In this regard, the Carpenters District Council contends that the playrooms in the basement and on the first floor of the building as well as the mechanical room and certain other facilities should be counted as non-residential. One of the playrooms in the building is apparently for use by children resident in the building. In our view this is very much a residential use. The other playrooms are for children resident in nearby buildings on the same property. The evidence indicates that it is fairly common when residential buildings are built in clusters for the same owner that recreational facilities will be concentrated in one of the buildings, and that when this is done all of the recreational facilities in the building are generally regarded as being residential. We regard this as a very reasonable approach. It

is also to be noted that the MTABA – Building Trades Council agreement indicates that for the purposes of determining whether a building is primarily residential or ICI, recreational facilities are not counted in the determination. Whether this approach is adopted, or whether all the playrooms are regarded as residential, which we feel would be the only reasonable alternative, the result is the same, namely, that the building is predominately residential in character. Accordingly, in all the circumstances we are satisfied that the project should be regarded as having come within the residential and not the ICI sector.

31. To summarize, we are satisfied that the work performed on both projects in question did not come within the industrial, commercial and institutional sector of the construction industry.

DECISION OF BOARD MEMBER H. KOBRYN;

1. This is my dissent from the majority in the above named cases as heard under section 150 of the Act which states as follows:

“The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers’ organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).”

That is the basic question which this Board must decide and this section gives the Board the right:

“‘sector’ means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermain sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.”

Looking at the industrial, commercial and institutional sector commonly known as the ICI sector and the meaning of these three words as spelled in Webster’s New World Dictionary, College Edition:

“Industrial” means (i) having the nature of or characterization by industry or industries, (2) of connected with, or resulting from industry, or industries, (3) for use by industries; said of products.

“Commercial” means (1) of or connected with commerce (2) made or done primarily for sale or profit.

“Commerce” means the buying and selling of goods, especially when done on a large scale between cities, countries, etc; business dealing; trade;

“Institutional” means of, pertaining to, or characteristic of an institution. “Institution” means (i) corporate body organized to perform some particular function, often in education, research, charity, etc.; an institution of learning; a financial institution; also, the building or buildings housing such a body.

The above meanings describing each word in the ICI sector is clear and unambiguous such as the meaning for institutional: “of an institution, pertaining to an institution or characteristic of an institution.”

2. The Legislature when it drafted and passed this legislation using the words “industrial”, “commercial” and “institutional” to describe the ICI sector were using words that were clearly understood by the parties in the construction industry to mean work performed by employees in the industrial, commercial and institutional construction and to give these words any other meaning would only be bastardizing their true meaning and intent.

3. Based on the above meanings I find the two projects in dispute fall within the meaning of institutional as follows:

(1) West York Construction project was the Salvation Army Training College as clearly described in the drawings of Exhibit #9. This is a project “of” and “pertaining to” the Salvation Army and is characteristic of that institution and its expansion training program. This is not a residential as defined in the collective agreement between the Metropolitan Toronto Apartment Builders Association and the Toronto Building and Construction Trades Council as outlined in Article 1.01 and its sub-clauses (i) to (vi).

(2) Van Bots Construction project was the staff residence and parking garage for the Hospital for Sick Children as clearly described in the drawings of Exhibit #10. This is a project “of” and “pertaining to” the Hospital for Sick Children and characteristic of that institutions new staff residence and parking garage and is not a residential building as defined in the M.T.A.B.A. and T.B. & C.T.C. collective agreement in Article 1.01 and its sub-clauses (i) to (vi).

One of the major arguments put forward by management was the great emphasis on the difference that exists between residential construction as compared to commercial, institutional construction in the costs of the construction and the skill required by the employees performing this construction. This very point comes out loud and clear when Mr. Bev Howard the President of Rampart Enterprises took the stand to give evidence?

“Q. – What is the difference in cost of residential forming and commercial forming?

A. – There is between a low residential bidder and low commercial bidder of 35 per cent.

Q. – Is there a difference in skills involved?

A. – I believe in a residential crew we have two or three leaders with skills comparable to people in a commercial crew and the rest of the crew is semi-skilled who work under the leader. In commercial field all people in the forming crew would be craftsmen.

Q. – Do you need a less perfect job in residential construction?

A. – Not really, but we do get less perfect job because the work is not controlled by architect. The standards are not as strict in residential as in commercial because most of the work is covered in residential.”

4. The above reasons of cost cutting, using lesser standards and semi-skilled workmen are the worst reasons for assigning the work involved in these two projects to residential construction when you consider the recent consultants’ report to the Ontario Government, estimating it will cost up to Six Billion Dollars over the next 20 years to up-grade and conserve all the privately built high-rise rental apartments constructed between the late 1950’s and 1981.

5. This report lists seven major areas that are in serious need of conservation and up-grading. Among the seven areas mentioned were weather protection, making roofs, walls and windows weatherproof, structural integrity of parking garages, building systems, such as galvanized plumbing, aluminum wiring and undersized (by today’s standard) electrical services, occupant safety & equipment and fittings. The report has this to say about their “initial design”:

“The report says the major reason conservation will cost so much is “the inadequacy of the initial design and construction”. Although information about the best construction and equipment is readily available, little of it reaches the ordinary workman or mechanic on the job.”

6. I will also refer in part to an editorial in the Toronto Star dated August 25, 1983 headlined “Rent Controls Don’t Ban Repairs”:

“A report prepared for the Ontario Housing Ministry says it will cost six billion in the next twenty years to keep the Province’s apartment buildings in good repair. At a glance that looks like a scary figure and it undoubtedly will be used by some people as an argument to get rid of rent controls. In fact it is no agreement at all for the abolition of controls. The report indicates that the main reason landlords face such massive repairs and maintenance bills is that the buildings were shoddily-built in the first place. So it would hardly be fair to lift controls and to saddle the tenants in one full swoop, with much of the cost of making up for builders’ short-sighted cost cutting.”

This cavalier attitude of the builders is not acceptable under any circumstances especially when one considers that for the average family the cost of shelter, whether it be ownership or rental is the largest expenditure they make in their lifetime. There are horror stories that abound of families with modest incomes paying as much as forty to fifty per cent of their incomes for

rent. These families and all persons seeking shelter deserve the certainty of a properly constructed shelter which will not require above average maintenance or major repairs to shoddy construction the costs of which they have to foot.

7. The report and its statements say it all, short-sighted cost-cutting cannot be tolerated and must be stopped for the protection of the unsuspecting public. The general public must be protected in the same manner as the owner and the general public are protected in industrial, commercial and institutional building construction by the vigilant architects. Who in turn make certain that the standards of materials and equipment are strictly adhered to and the work performed is properly performed by qualified skilled tradesmen to his standards and specifications. This is the least that the general public should expect.

8. As further protection these skilled tradesmen are trained under the *Apprenticeship and Tradesmen's Qualifications Act*. When this Act was passed by Legislature it had two main purposes, (i) a highly trained and qualified workforce and (2) the protection of the general public from shoddy work performed by unqualified workmen. This legislation was to assure the public that the tradesman who performed building construction was fully trained in all aspects of his respective trade through an approved apprenticeship system with the assurance that he can skillfully and properly perform his work. That is why I reject the argument, we should have the work because we do cheaper.

9. For all the above reasons, I find the two projects in dispute fall within the industrial, commercial and institutional sector and the applicant should succeed.

1835-83-U The Windsor Newspaper Guild Local 239, The Newspaper Guild (CLC-AFL-CIO) Complainant, v. **The Windsor Star**, Respondent

Duty to Bargain in Good Faith – Unfair Labour Practice – Employer refusing to provide union with current salary paid to each employee in unit – Board finding breach of bargaining duty

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members I. M. Stamp and B. L. Armstrong.

APPEARANCES: Naomi Duguid, Frederica Wilson and Bill Schiller for the complainant; M. Patrick Moran, Art Kainz and James Bruce for the respondent.

DECISION OF THE BOARD; December 20, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of sections 15, 64, 65, 66 and 67 of the Act. More specifically, it is alleged that the respondent employer is refusing to provide the complainant union with the wage data which it requires to bargain on behalf of the employees in the bargaining unit.

2. It is not disputed that the employer, while supplying the union with the minimum

average and maximum salaries within each classification and offering to supply the union with a list of each of the salaries paid within each classification is not prepared to advise the union of the salaries paid to each named individual within the bargaining unit prior to the commencement of bargaining. The employer maintains that individual employees may not want the union to know what they are being paid and in these circumstances it is not at liberty to breach the confidence of these employees vis-a-vis their individual wage rates.

3. Having regard to the requirement upon the complainant trade union to represent all of the employees in the bargaining unit and to the nature of the bargaining duty as it pertains to the requirement upon the employer to provide the union with the wage and salary information which it requires to negotiate on behalf of all of the employees in the bargaining unit (see *DeVilbiss (Canada) Limited*, (1976) OLRB Rep. March 49, *Consolidated Bathurst Packaging Limited* [1983] OLRB Rep. Sept. 1411, we hereby confirm our oral decision given verbally at the hearing as follows:

Having considered the submissions of the parties our ruling is that the refusal of the respondent employer to provide the union with *the salary currently paid to each individual in the bargaining unit* constitutes a breach of the duty to make every reasonable effort to conclude a collective agreement under section 15 of the Act. The union, as the certified collective bargaining representative of all employees in the bargaining unit, requires the information for the purpose of formulating its wage and classification proposals and responding to the proposals put forward by the representative of the respondent. Furthermore, this information will be required by the union in order to administer a collective agreement which will provide that employees currently earning above the minimum will maintain this differential over the minimum. The respondent has breached section 15 of the Act by refusing to provide this information and, in the exercise of our discretion under section 89 of the Act, we hereby direct the respondent to provide the complainant union with a list of the salaries paid to each named individual in the bargaining unit. We also confirm the undertaking of the respondent to supply lists showing experience rating for those who have an experience rating and starting date in the classification for those who do not have an experience rating.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1983

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0745-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Heart Construction Co. Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

0746-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Montemar Construction Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

0842-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Fantin Bros. Carpentry Limited, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton, within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (17 employees in unit).

1786-82-R: Canadian Union of Public Employees, (Applicant) v. Covenant House Under 21 Youth Foundation of Metropolitan Toronto, (Respondent).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except co-ordinators, maintenance staff, housekeeping staff, cooks, community relations officer, ombudsman, office, clerical and computer staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (38 employees in unit).

Unit #2: (*See Applications for Certification Dismissed - No Vote Conducted*).

2307-82-R: Labourer's International Union of North America, Local 183, (Applicant) v. Pietro Cipriano Construction Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

2383-82-R: Teamsters Chemical, Energy and Allied Workers Union Local 424, (Applicant) v. General Printing Ink Corporation of Canada Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, confidential secretaries, those above the rank of supervisor and confidential secretary, sales staff, laboratory staff, and employees covered by a subsisting collective agreement." (5 employees in unit).

0461-83-R: The Canadian Union of Public Employees, (Applicant) v. The Milton Public Library, (Respondent).

Unit #1: "all employees of the respondent in Milton, save and except Chief Librarian and Secretary Treasurer to the Library Board, Secretary/Bookkeeper to the Chief Librarian, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and pages." (21 employees in unit).

Unit #2: "all employees of the respondent in Milton regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Chief Librarian and Secretary Treasurer to the Library Board, Secretary/Bookkeeper to the Chief Librarian, supervisors and persons above the rank of supervisor, and pages". (13 employees in unit).

0646-83-R: International Ladies' Garment Workers' Union, (Applicant) v. Vogue Brassiere Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, mechanics, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (133 employees in unit).

1119-83-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Local 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. William M. Gerrits Contractors Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

1123-83-R: The International Association of Machinists and Aerospace Workers, (Applicant) v. Imperial Clevite Canada Inc. Mechanical Products, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent at its Mechanical Products Division in St. Thomas, Ontario save and except foremen, supervisors, managers and persons above the rank of foreman, supervisor and manager, secretaries to the plant managers, secretary to the treasurer, persons employed in the personnel department, students employed during the school vacation period and students employed on a co-operative basis with a University or Community College, persons regularly employed for not more than twenty-four hours per week, cafeteria staff, plant guards and persons covered by subsisting collective agreement with the International Association of machinists and Aerospace Workers Local 1975." (33 employees in unit).

1131-83-R: United Steelworkers of America, (Applicant) v. Ferrum Metal Mfg. Co., a Division of Elite Blouse and Skirt Company Limrrying on business as Sunwest Homes, (Respondent).

Unit #1: "all construction labourers in the employ of the ty of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four hours (24 hrs.) per week and students employed during the school vacation period. (62 employees in unit). (*Having regard to the agreement of the parties*).

1239-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Sunwest Developments Limited, carrying on business as Sunwest Homes, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers' in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1336-83-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Jayden Inc. Glanz Office Furniture Inc., (Respondents).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent Jayden Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent Jayden Inc. in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1365-83-R: United Brotherhood of Carpenters and Joiners of America, Lcoal 494, (Applicant) v. The Kinsmen Club of Leamington, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

1366-83-R: Labourers' International Union of North America, Local 837, (Applicant) v. Freure Homes Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality above the rank of non-working foreman." (21 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees in unit).

1381-83-R: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. The Corporation of the City of Etobicoke, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit #1: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1425-83-R: United Steelworkers of America, (Applicant) v. 550078 Ontario Inc. 550079 Ontario Inc., 550080 Ontario Inc., carrying on business as Hyrec Contracting, (Respondent) v. Ironworkers District Council of Ontario, (Intervener #1) v. International Union of Operating Engineers, Local 793, (Intervener #2) v. Sheet Metal Workers' International Association, Local 897, (Intervener #3).

Unit: "all electricians, electricians' apprentices, millwrights, millwrights' apprentices, sheet metal workers, sheet metal workers' apprentices, painters, painters' apprentices and labourers employed at the respondent's Hemlo Project of Noranda Mines, Marathon, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (38 employees in unit).

1435-83-R: Ironworkers District Council of Ontario, (Applicant) v. 550078 Ontario Inc., 550079 Ontario Inc., 550080 Ontario Inc., carrying on business as Hyrec Contracting, (Respondent) v. United Steelworkers of America, (Intervener #1) v. International Union of Operating Engineers, Local 793, (Intervener #2).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees in unit).

1453-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. 550078 Ontario Inc., 550079 Ontario Inc., 550080 Ontario Inc., carrying on business as Hyrec Contracting, (Respondent) v. United Steelworkers of America, (Intervener #1) v. Ironworkers District Council of Ontario, (Intervener #2).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1457-83-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Sandercock Construction (1976) Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

1458-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Anchor Machine & Manufacturing Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

1474-83-R: Service Employees Union, Local 183 AFL, CIO, CLC, (Applicant) v. Cer-A-Met Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Hallowell, save and except the General Manager, Persons above the rank of General Manager, office and sales staff and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

1549-83-R: Health, Office & Professional Employees, a Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial Workers International Union, (Applicant) v. Vernon Nursing Home Services Ltd., (Respondent).

Unit: "all employees of the respondent at Huntsville, Ontario, save and except registered and graduate nurses, paramedical employees, secretary to the administrator, supervisors and persons above the rank of supervisor." (40 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1559-83-R: Service Employees Union, Local 204, Affiliated with the AFL, CIO, CLC, (Applicant) v. Campeau Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in its Shopping Centres Division in the Municipality of Metropolitan Toronto, save and except managers, supervisors, persons above the rank of manager and supervisor and office and clerical employees and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

1565-83-R: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Frank Heller & Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Town of Halton Hills save and except supervisors and those persons above the rank of supervisor, office, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (109 employees in unit).

Unit #2: (*See Applications for Certification Dismissed – No Vote Conducted*).

1568-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Northern Breweries Ltd., (Respondent).

Unit: "all office staff at 1101 West-Walsh Street, Thunder Bay, Ontario, save and except manager, supervisor and salesmen." (2 employees in unit). (*Having regard to the agreement of the parties*).

1573-83-R: Canadian Union of Public Employees, (Applicant) v. The Children's Aid Society of the Regional Municipality of Halton, (Respondent).

Unit: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in the Regional Municipality of Halton, save and except executive director, secretary to the executive director, comptroller, assistant to the comptroller, supervisor of alternate care, supervisor of family services, supervisor/co-ordinator volunteer department, adoption supervisor, personnel and labour relations supervisor, secretary to personnel and labour relations supervisor and persons covered by a subsisting collective agreement." (14 employees in unit). (*Having regard to the agreement of the parties*).

1583-83-R: Ironworkers District Council of Ontario, (Applicant) v. Semple-Gooder Roofing Ltd., (Respondent) v. Ontario Sheet Metal Workers' Conference, (Intervener).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1600-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 3054, (Applicant) v. General Home Systems Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at its plant in Huron County, Ontario, save and except managers, persons above the rank of manager, and employees covered by an existing collective agreement." (10 employees in unit). (*Having regard to the agreement of the parties*).

1604-83-R: Bakery, Confectionery & Tobacco Workers International Union, Local 181, (Applicant) v. Open Window Bakery Ltd., (Respondent).

Unit: "all employees of the respondent at 1125 Finch Avenue, West, Downsview, Ontario, save and except foremen, persons above the rank of foreman, office and retail sales staff, franchise drivers, persons regularly employed for not more than 24 hours per week, students employed during school vacation periods and persons covered by subsisting collective agreements." (78 employees in unit). (*Having regard to the agreement of the parties*).

1607-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2466, (Applicant) v. Vie-Bilt General Contractors Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1627-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. MacDonald Beverages, (Respondent).

Unit: "all employees of the respondent working in and out of Sault Ste. Marie, Ontario, save and except foremen and/or sales representatives, persons above the rank of foreman or sales representative, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*).

1628-83-R: Alliance Employees Union, (Applicant) v. Union of Public Service Commission Employees (SECO), (Respondent).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except the national executive secretary and elected officers." (2 employees in unit). (*Having regard to the agreement of the parties*).

1632-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Corrado Carpenter Contractor Limited, (Respondent).

Unit: "all construction labourers, carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

1635-83-R: Canadian Union of Public Employees, (Applicant) v. Emmanuel-Howard Park Day Nursery, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (4 employees in unit). (*Having regard to the agreement of the parties*).

1642-83-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ewing & Gregors Woodworking Limited, (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

1643-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Ewald Zieger Design Consultants, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and

except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

1652-83-R: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. McKinlay Drywall Ltd., (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

1670-83-R: Graphic Communications International Union, Local 542, (Applicant) v. L. B. Enterprises 492398 Limited, (Respondent).

Unit: “all employees of the respondent in the City of Guelph, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (23 employees in unit). (*Having regard to the agreement of the parties*).

1676-83-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. John Ziner Lumber Ltd., (Respondent).

Unit: “all employees of the respondent in Scarborough and Ajax, Ontario, save and except persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (123 employees in unit). (*Having regard to the agreement of the parties*).

1685-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Versa Services Ltd., (Respondent).

Unit: “all employees of the respondent at the George Brown College, Casa Loma Campus, 160 Kendal Avenue, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (13 employees in unit).

1686-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Transway Construction Limited, (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all employees of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand,

excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1688-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Beaver Seaway Construction Division, Beaver Construction Group Limited, (Respondent).

Unit: "all employees of the respondent in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of foreman." (2 employees in unit).

1700-83-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Metropoli Construction Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1709-83-R: Amalgamated Clothing and Textile Workers Union, Toronto Joint Board, (Applicant) v. Tiny Tots Knitting Mills Inc., (Respondent).

Unit: "all employees of the Respondent in the City of Kitchener, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, designers, office and sales staff, home-workers, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (54 employees in unit). (*Having regard to the agreement of the parties*).

1710-83-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Brytor International Limited, (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

1712-83-R: United Steelworkers of America, (Applicant) v. Innovative Wood Products (Division of Nightingale Industries Limited), (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (54 employees in unit). (*Having regard to the agreement of the parties*).

1722-83-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Armbro Materials & Construction Ltd., (Respondent).

Unit: "all truck drivers in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan) the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

1725-83-R: International Union of Operating Engineers, Local 772, (Applicant) v. Domtar Inc., Domtar Chemicals Group, Organic Chemicals Division, (Respondent) v. Energy and Chemical Workers Union Local 24, (Intervener) v. Employee, (Objector).

Unit: "all employees of the respondent at its chemicals group organic chemicals division on Strathearne Ave. north in Hamilton, save and except foreman and supervisors, those above the rank of foreman and supervisor, chief engineer, confidential office secretary, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and those employees covered by existing collective agreement." (19 employees in unit). (*Having regard to the agreement of the parties*).

1747-83-R: Sheet Metal Workers' International Association, (Applicant) v. Meta-Logik Construction Inc., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1748-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Viewmark Homes Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

1753-83-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Zero-O-Loc Enterprises Limited, (Respondent).

Unit #1: "all carpenters' and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1765-83-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Toledo Scale Division of Reliance Electric Ltd., (Respondent).

Unit: "all employees of the respondent in Barrie, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff." (3 employees in unit). (*Having regard to the agreement of the parties*).

1770-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Trillium Carpentry Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1771-83-R: Ironworkers District Council of Ontario, (Applicant) v. Unita Forming Ltd., (Respondent).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1772-83-R: Local 47, Sheet Metal Workers' International Association, (Applicant) v. Scan Air Balance Ltd., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carlton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1776-83-R: The Canadian Union of Public Employees, (Applicant) v. The Royal Ottawa Hospital, (Respondent).

Unit: "all employees of the respondent in Ottawa regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, one secretary to the Executive Director, personnel department staff, one secretary to the Associate Executive Director – Rehab, one secretary to the Associate

Executive Director – Psychiatry, one secretary to the Director of Finance, one secretary to the Psychiatrist-in-Chief, one secretary to the office of Psychiatrist-in-Chief and Administration – Psychiatry, one secretary and one staffing clerk to the Director of Nursing – Psychiatry, one secretary to the Director of Nursing – Rehab, one secretary to the Director of Adult Services – Psychiatry, one clerk to the Administrative Assistant – Rehab, Executive Assistant to the Executive Director, Assistant Accountants, Payroll Supervisor, Professional Librarians, Admitting Officer, professional medical staff, student interns in the clinical professions graduate nursing staff, undergraduate Nurses, graduate Pharmacists, undergraduate Pharmacists, graduate Dietitians, student Dietitians, certified Prosthetist, certified Orthotist, Rehabilitation Engineer, Computer Engineer, Assistant Staff Education Co-ordinator – Rehab, Security Supervisor, Public Relations Assistant, Analysts – Management Information Systems, Vocational Rehabilitation Counsellors, technical personnel, social workers and employees covered by subsisting collective agreements.” (142 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1785-83-R: United Steelworkers of America, (Applicant) v. Schauenburg Industries Ltd., (Respondent).

Unit: “all employees of the respondent in the City of North Bay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (21 employees in unit). (*Having regard to the agreement of the parties*).

1790-83-R: Canadian Union of Public Employees, (Applicant) v. Bi-West Inc., (Respondent).

Unit: “all employees of the respondent employed at Cornwall, Ontario, save and except foremen, persons above the rank of foreman and persons covered by a subsisting collective agreement.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1792-83-R: Local 47, Sheet Metal Workers’ International Association, (Applicant) v. Camille Plumbing and Heating Ltd., (Respondent).

Unit: “all sheet metal workers and sheet metal workers’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1814-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Louisiana Purchase Restaurants Limited and 482241 Ontario Limited, (Respondent).

Unit: “all employees of the respondent at its restaurants at 100 King Street West (First Canadian Place) City of Toronto, save and except supervisors, persons above the rank of supervisor, office and accounting staff.” (43 employees in unit). (*Having regard to the agreement of the parties*).

1815-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. CVL Products Ltd, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Thorold, Ontario, save and except foremen, forewomen, persons above the rank of foreman, forewoman, office and sales staff.” (68 employees in unit). (*Having regard to the agreement of the parties*).

1820-83-R: Energy and Chemical Workers Union, (Applicant) v. Fragrance Manufacturing Company, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than

twenty-four (24) hours per week and students employed during the school vacation period.” (39 employees in unit). (*Having regard to the agreement of the parties*).

1825-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Petro Chem Plastics Inc., (Respondent).

Unit: “all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (52 employees in unit). (*Having regard to the agreement of the parties*).

1861-83-R: The Ontario Provincial Conference of Bricklayers & Allied Craftsmen, (Applicant) v. Bi-baldi Homes Ltd., (Respondent).

Unit #1: “all bricklayers and bricklayer’s apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1879-83-R: Upholsterer’s International Union of North America, (Applicant) v. Berkline Limited, (Respondent).

Unit: “all employees of the respondent in the City of Cornwall, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff.” (8 employees in unit). (*Having regard to the agreement of the parties*).

1889-83-R: Labourers’ International Union of North America, Local 1059, (Applicant) v. State Contractors, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

1891-83-R: United Brotherhood of Carpenters and Joiners of America, Local 446, (Applicant) v. 499168 Ontario Inc., operating as Taurus Construction, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1922-83-R: Local 47, Sheet Metal Wrokers’ International Association, (Applicant) v. Les Entreprises Germain Paradis Ltee, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1939-83-R: Local 47, Sheet Metal Workers' International Association, (Applicant) v. Societe de Climatisation Kol-Tech, (Respondent).

Unit #1: "all sheet metal workers and sheet metal workers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of foreman." (2 employees in unit).

Unit #2: "all sheet metal workers and sheet metal workers' apprentices of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of foreman." (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1183-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Cosa Nova Fashions Ltd. and Cosa Nova Fashions Ltd. carrying on business as Harolds Furs, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical and sales staff, designers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (275 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		274
Number of names of persons who cast ballots	235	
Number of spoiled ballots		8
Number of ballots marked in favour of applicant		115
Number of ballots marked against applicant		95
Ballots segregated and not counted		17

1405-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. McGaw Manufacturing, Division of McGaw Supply Ltd., (Respondent) v. Canadian Textile and Chemical Union, (Intervener).

Unit: "all employees of the respondent at Brantford, save and except supervisors, persons above the rank of supervisor, persons employed exclusively as a watch person, office and sales staff, and quality control technicians." (166 employees in unit).

Number of names of persons on list as originally prepared		166
Number of persons who cast ballots	162	
Number of ballots marked in favour of applicant		85
Number of ballots marked in favour of intervener		77

1551-83-R: Amalgamated Clothing & Textile Workers Union, AFL, CIO, CLC, (Applicant) v. Fabulous Formals Ltd. "Division of Almar Inc.", (Respondent).

Unit: "all employees of the respondent in Midland, save and except foremen, foreladies, persons above the rank of foreman or forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (124 employees in unit). (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		127
Number of persons who cast ballots	125	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		66
Number of ballots marked against applicant		58

Bargaining Agents Certified Subsequent to a Post Hearing Vote

0968-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. W. Rourke Ltd., (Respondent).

Unit: "all construction labourers, carpenters, truckdrivers and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (51 employees in unit).

Number of names of persons on list as originally prepared		47
Number of persons who cast ballots	42	
Number of ballots marked in favour of applicant		31
Number of ballots marked against applicant		11

1143-83-R: Canadian Union of United Brewery, Flour, Cereal Soft Drink and Distillery Workers, (Applicant) v. B. C. Poly Grinders Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Bramalea, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (42 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		42
Number of persons who cast ballots	41	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		25
Number of ballots marked against applicant		12
Ballots segregated and not counted		3

Applications for Certification Dismissed – No Vote Conducted

1786-82-R: Canadian Union of Public Employees, (Applicant) v. Covenant House Under 21, Youth Foundation of Metropolitan Toronto, (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in unit).

1423-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Des-Build Development Limited, (Respondent). (5 employees in unit).

1565-83-R: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Frank Heller & Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent in the Town of Halton Hills regularly employed for not more than 24 hours per week save and except supervisors and those persons above the rank of supervisor, office, technical and sales staff, and students employed during the school vacation period." (7 employees in unit).

1711-83-R: Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Contrast Shipping Lines Ltd. and/or Newman Harbour Terminals & Transportation Corporation, (Respondents). (6 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1182-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except assistant supervisor, persons above the rank of assistant supervisor, office, clerical and sales staff, and designers". (4 employees in unit) (*Having regard to the agreement of the parties*).

Number of names on revised voters' list		4
Number of names of persons who cast ballots	0	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		0

1380-83-R: Retail, Wholesale and Department Store Union, (Applicant) v. Knob Hill Farms Limited, (Respondent).

Unit: "all employees of the respondent at its retail operations in the Municipality of Metropolitan, save and except department managers and persons above the rank of department manager." (323 employees in unit).

Number of names of persons on revised voters' list		328
Number of persons who cast ballots	310	
Number of ballots marked in favour of applicant		72
Number of ballots marked against applicant		234
Ballots segregated and not counted		4

1584-83-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Superior Propane Limited, (Respondent).

Unit: "all employees of the respondent working at and out of the Township of Vaughan save and except supervisors, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (111 employees in unit).

Number of names of persons on list as originally prepared		103
Number of persons who cast ballots	102	
Number of ballots marked in favour of applicant		30
Number of ballots marked against applicant		49
Ballots segregated and not counted		23

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0711-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Two Star Construction Ltd., (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees in unit).

Number of names of persons on revised voters' list		31
Number of persons who cast ballots	17	
Number of spoiled ballots		1
Number of ballots marked in favour of Carpenters' Local 1190		12
Number of ballots marked in favour of Labourers' Local 183		3
Ballots segregated and not counted		1

0759-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Two Star Construction Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees in unit).

Number of names of persons on revised voters' list		31
Number of persons who cast ballots	17	
Number of spoiled ballots		1
Number of ballots marked in favour of Carpenters' Local 1190		12
Number of ballots marked in favour of Labourers' Local 183		3
Ballots segregated and not counted		1

0247-82-R: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union No. 124, Ottawa/Hull on behalf of all affiliated bargaining agents of the employee bargaining agency, namely the Operative Plasterers and Cement Masons International Association of the United States and Canada; or Provincial Conference of Ontario of the Operative Plasterers and Cement Masons International Association of United States and Canada, (Applicant) v. Duron Ottawa Ltd., (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all cement masons and cement masons' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees in unit).

Number of names of persons on revised voters' list		53
Number of persons who cast ballots	33	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		8
Number of ballots marked in favour of intervener		11
Ballots segregated and not counted		13

0558-83-R: Labourers' International Union of North America, Local 527, (Applicant) v. TMG Rock Contractors Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Number of names of persons on list as originally prepared		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		4

1311-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 271, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent York Condominium Corporation No. 271, engaged in cleaning at 240 Scarlett Road, Toronto, Ontario (Lambton Square), including resident superintendents, save and except property manager and persons above the rank of property manager." (4 employees in unit).

Number of names of persons on list as originally prepared		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		4

1312-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 241, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent York Condominium Corporation No. 241 engaged in cleaning at 250 Scarlett Road, Toronto, Ontario (Lambton Square), including resident superintendents, save and except property manager and persons above the rank of property manager." (4 employees in unit).

Number of names of persons on list as originally prepared		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		3

1313-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 394, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent York Condominium Corporation No. 394 engaged in cleaning at 270 Scarlett Road, Toronto, Ontario (Lambton Square), including resident superintendents, save and except property manager and persons above the rank of property manager." (4 employees in unit).

Number of persons on list as originally prepared		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		4

1314-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 336, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent York Condominium Corporation No. 336 engaged in cleaning at 260 Scarlett Road, Toronto, Ontario (Lambton Square), including resident superintendents, save and except property manager and persons above the rank of property manager." (4 employees in unit).

Number of names of persons on list as originally prepared		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		3

1356-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Boart Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (22 employees in unit).

Number of names of persons on list as originally prepared		22
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		16

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1122-83-R: Labourers' International Union of North America, Ontario Provincial District Council, Local 1059, (Applicant) v. Anthes Equipment Limited, (Respondent) v. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, Local 1946, (Intervener).

1440-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Canadian Mine Services Ltd. and Cameron McMynn Contracting Ltd., (Respondent) v. United Steelworkers of America, (Intervener #1) v. Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607, (Intervener #2).

1539-83-R: Canadian Union of Public Employees, (Applicant) v. Sudbury Memorial Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

1575-83-R: Canadian Union of Public Employees, (Applicant) v. Bi-West Contracting Limited, Cornwall Division, (Respondent).

1608-83-R: Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Rosemount Commercial Communications Inc., (Respondent).

1634-83-R: Canadian Union of Public Employees, (Applicant) v. Ontario Cancer Treatment and Research Foundation, (Respondent).

1651-83-R: Toronto Typographical Union No. 91 (ITU), (Applicant) v. Impressions Advertising, (Respondent).

1684-83-R: The International Association of Bridge, Structural & Ornamental Ironworkers, Local 786, (Applicant) v. Ron Adam (Adam Reinforcing), (Respondent).

1793-83-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508, (Applicant) v. China Steel Limited, (Respondent).

1840-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Central Chrysler Plymouth (1981) Limited, (Respondent).

1855-83-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario Operating St. Joseph Hospital at Sarnia, Ontario, (Respondent).

1944-83-R: Toronto Typographical Union No. 91 (ITU), (Applicant) v. Impressions Advertising Inc., (Respondent).

SALE OF A BUSINESS

1350-83-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Canadian Hotels International, (Respondent). (*Withdrawn*)

1566-83-R: Canadian Union of Public Employees, and its Locals 904, 1182, 1307, 1771-A, 1771-B, 1771-C and 2770, (Applicant) v. Extendicare Ltd., (Respondent) v. Service Employees Union Locals 204, 183, 532, 478, 268 and London and District Service Workers' Union Local 220, (Intervener). (*Granted*).

1585-83-R: Amalgamated Clothing and Textile Workers Union, Local 998, (Applicant) v. Perth Services Ltd., (Respondent). (*Granted*).

1629-83-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Applicant) v. Holiday Motel, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0041-82-R: Eduino Ribeiro, (Applicant) v. Carpenters' District Council of Toronto and vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963 and 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Respondent) v. Inducon Development Corporation, Inducon Construction (Northern) Inc., and Inducon Design/Build Associates, (Interveners)

Unit: "all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario." (19 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		10
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		8

1577-82-R: Marvin MacKay on behalf of a group of employees, (Applicant) v. United Steelworkers of America and its Local 13571, (Respondent) v. Irwin Toy Limited, (Intervener).

Unit: "all employees of the intervener employed at 165 North Queen Street, Etobicoke, save and except foremen and foreladies, office and sales staff and students employed during the school vacation period." (52 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		50
Number of persons who cast ballots	48	
Number of ballots marked in favour of respondent		13
Number of ballots marked against respondent		35

2337-82-R: Barb Robinson, Remy Heard, Brenda Graham, Antonella DeRenzo, Wendy Ou-Brown, Hilda VanGyssel, Carole Ann Whitaker, Valerie Pison and Margo T. McCabe, (Applicants) v. Retail Commercial & Industrial Union, Local 206, (Respondent) v. Fabricland Distributors Limited, (Intervener).

Unit #1: "all employees of the employer at Guelph, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period on September 22nd, 1983." (4 employees in unit). (*Granted*).

Number of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

Unit #2: "all employees of the employer at Guelph, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager on September 22nd, 1983." (6 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		5
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		4

1288-83-R: Mahendra Singh, Heinrich Guthrol, Albert Lutz and V. Duraikannan, (Applicants) v. The Teamsters Local Union #879, (Respondent) v. Wright Abrasives Inc., (Intervener).

Unit: "all production plant employees of the intervener at Hamilton, save and except supervisors, persons above the rank of supervisor, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week." (15 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		16
Number of persons who cast ballots	14	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		14

1320-83-R: Wilfred Hector Picardo & Others, (Applicants) v. The United Steel Workers of America, (Respondent) v. Almag Aluminum Ltd., (Intervener).

Unit: "all employees of Almag Aluminum Ltd. at its Brampton, Ontario plant save and except forepersons, persons above the rank of foreperson, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit). (*Granted*).

1342-83-R: Gordon A. Belrose, on his behalf and on behalf of a Group of Employees, (Applicant) v. United Steelworkers of America, (Respondent) v. Baltimore Aircoil Inter-American Corporation, (Intervener).

Unit: "all employees of Baltimore Aircoil Inter-American Corporation regularly employed at Halton Hills, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period." (47 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared		47
Number of persons who cast ballots	47	
Number of ballots marked in favour of respondent		27
Number of ballots marked against respondent		18
Ballots segregated and not counted		2

1370-83-R: Kathryn Nahmabin and Robert Murray, (Applicants) v. United Auto Workers (Local 27), (Respondent) v. Keeprite Inc. – Unifin Division, (Intervener).

Unit: “all office and clerical and technical employees of Keeprite Inc. – Unifin Division in the city of London, (save and except supervisors, persons above the rank of supervisor, professional engineers, secretary to the General Manager, Company Accountant, Product Managers, Product Manager Trainee, Cost Accountant, Computer Programmer, Programmer Analyst, Senior Produce Development Technician, Senior Industrial Engineering Technician, Industrial Engineering Technicians, Payroll Accountant, Personnel Administrator, Personnel Assistant, Sales Co-ordinator, students employed during the school vacation period, students in a co-operation training program, and employees covered by the U.A.W. Local 27 agreement).” (35 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		26
Number of persons who cast ballots	25	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		24

1410-83-R: Charles Butt, (Applicant) v. Christian Labour Association of Canada, (Respondent) v. Harrow Tube, a Division of H. Z. & S. Management, (Intervener).

Unit: “all employees of H. Z. & S. Management Inc. at its Harrow Tube Division, Harrow, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (29 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		17

1411-83-R: George Mihailidis, (Applicant) v. Canadian Union of Operating Engineers and General Workers, Local 101, (Respondent) v. Midmetro Plastics Limited, (Intervener).

Unit: “all employees of Midmetro Plastics Ltd. in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (4 employees in unit). (*Dismissed*).

1713-83-R: Roberta Lucas, (Applicant) v. International Beverage Dispensers’ & Bartenders Union, Local 280, (Respondent) v. Chez Moi Tavern Limited, (Intervener). (17 employees in unit). (*Dismissed*).

1749-83-R: All Nurses of the St. Jacques Nursing Home, (Applicant) v. Ontario Nurses’ Association, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the St. Jacques Nursing Home, Embrun, Ontario, save and except Director of Nursing and persons above the rank of Director of Nursing.” (3 employees in unit). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

1348-83-M: Garden City Sanitation (Robran Construction), (Employer) v. Canadian Union of Public Employees and its Local 1045, (Trade Union). (*Terminated*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0065-83-U: The Board of Education for the Borough of Scarborough, (Complainant) v. The Ontario Secondary School Teachers' Federation and others listed on Schedule "A", (Respondents). (*Granted*).

1972-83-U: Electrohome Limited, (Applicant) v. International Brotherhood of Electrical Workers and Local Union 2345, Mervyn Reist, Elmer Brown and Herbert Hoffman, (Respondents). (*Granted*).

1999-83-U: Consumers Distributing Company Limited, (Applicant) v. F. Beacham, Rick Coles, Ed Faultless, Peter Harte, Ron Castro, G. Mulholland, P. Robin, James Stewart and Peter Stram, (Respondents). (*Withdrawn*).

2000-83-U: Consumers Distributing Company Limited, (Applicant) v. F. Beacham, Rick Coles, Ed Faultless, Peter Harte, Ron Castro, G. Mulholland, P. Robin, James Stewart and Peter Stram, (Respondents). (*Granted*).

APPLICATIONS FOR UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1984-83-U: Mitchell Construction Company Ltd., (Applicant) v. International Brotherhood of Electrical Workers, Local 353, R. Carroll, et al, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

1593-83-U: United Brotherhood of Carpenters and Joiners of America, Local 1669, and International Association of Bridge, Structural and Ornamental Ironworkers, Local 759, (Complainants) v. Camerono McMyynn Contracting Limited, Canadian Mine Enterprises Limited, Canadian Mine Services Limited and Noranda Mines Limited and Noranda Exploration Company Limited, (Respondents). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0200-82-U: Alvin Plummer, (Complainant) v. Operative Plasterers' & Cement Masons' International Association, Local 172, (Respondent) v. Swing Stage Ltd., (Intervener). (*Granted*).

0066-83-U: United Steelworkers of America, and its Local 13571, (Complainant) v. Irwin Toy Limited, (Respondent) v. Marvin MacKay on behalf of a group of employees, (Intervener). (*Granted*).

0220-83-U; 0258-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. The Mill Restaurant, (Respondent). (*Granted*).

0346-83-U: Ontario Sheet Metal Air Handling Group, (Complainant) v. Acme Plumbing and Heating, (Respondent). (*Granted*).

0396-83-U: Retail, Wholesale and Department Store Union, (Complainant) v. Knob Hill Farms Limited, (Respondent). (*Withdrawn*).

0811-83-U: International Ladies' Garment Workers' Union, (Complainant) v. Vogue Brassiere Inc., (Respondent). (*Withdrawn*).

0862-83-U: Christian Labour Association of Canada, (Complainant) v. Carroll Electric (1982) Limited, (Respondent). (*Withdrawn*).

0929-83-U: Retail, Wholesale and Department Store Union, (Complainant) v. Knob Hill Farms Limited, (Respondent). (*Withdrawn*).

0985-83-U: John Naboth Osborne, (Complainant) v. Amalgamated Transit Union, Local 113, (Respondent) v. Toronto Transit Commission, (Intervener). (*Dismissed*).

1075-83-U: Teamsters Local Union 419, (Complainant) v. Acklands (Ontario) Limited, (Respondent). (*Withdrawn*).

1129-83-U: Retail, Wholesale and Department Store Union, (Complainant) v. Knob Hill Farms Limited, (Respondent). (*Withdrawn*).

1400-83-U: Sergio Petrelli, (Complainant) v. United Food and Commercial Workers International Union, Local 114P, (Respondent). (*Dismissed*).

1428-83-U: Canadian Union of Public Employees, (Complainant) v. Domus Building Cleaning Co. Ltd., (Respondent). (*Granted*).

1465-83-U: Milvoje Topovic, (Complainant) v. Service Employees Union, Local 204, AFL, CIO, (Respondent). (*Withdrawn*).

1476-83-U: Mario Voce, (Complainant) v. George Ellis, Union Representative, United Food and Commercial Workers International Union, Local 530P, (Respondent) v. Lancia Bravo, (Intervener). (*Dismissed*).

1477-83-U: T. Norton and Group of Members of the Canadian Union of Operating Engineers and General Workers, Local 222, (Complainants) v. Canadian Union of Operating Engineers and General Workers and its Local 222, its Executive and its President of same Local, namely Grant Hartley, (Respondent). (*Dismissed*).

1485-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Sunwest Developments Limited, carrying on business as Sunwest Homes and/or Super West Homes Inc., (Respondents). (*Withdrawn*).

1495-83-U: Patrick A. Dunn, (Complainant) v. Retail, Wholesale Dairy and General Workers Union (AFL, CIO, CLC), (Respondent). (*Withdrawn*).

1507-83-U: Millworkers Local 802, United Brotherhood of Carpenters and Joiners – James Graham, Jack Snyder, et al, (Complainants) v. Industrial Fabricators (Division of 395660 Ontario Limited), (Respondent). (*Dismissed*).

1527-83-U: Retail, Wholesale and Department Store Union, (Complainant) v. Sheridan Inn, (Respondent). (*Withdrawn*).

1528-83-U: Joanne Sampson, (Complainant) v. Union President N. Stefanov, (Respondent). (*Withdrawn*).

1529-83-U: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Complainant) v. Appcon Limited; Sunsqueeze Juices Incorporated, (Respondent). (*Withdrawn*).

1532-83-U: International Woodworkers of America, (Complainant) v. Merit Paper Bag Company Limited, (Respondent). (*Granted*).

1558-83-U: Service Employees International Union, Local 183, AFL, CIO, CLC, (Complainant) v. Centre Hastings Nursing Homes Limited, (Respondent). (*Withdrawn*).

1591-83-U: International Union of Operating Engineers, Local 793, (Complainant) v. Noranda Mines Limited and Noranda Exploration Company Limited, Canadian Mine Services Limited, Cameron McMynn Contracting Limited, Canadian Mine Enterprises Limited, (Respondents) v. Labourers International Union of North America Ontario Provincial District Council, Labourers International Union of North America, Local 607, United Brotherhood of Carpenters and Joiners of America, Local 1669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 and United Steelworkers of America, (Interveners). (*Granted*).

1638-83-U: Fernando Da Silva, (Complainant) v. Robson Lang Leathers Inc. and Amalgamated Meat Cutters Butcher Workmen Local A-485, (Respondent). (*Withdrawn*).

1646-83-U: United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. Tektron Equipment Corporation, (Respondent). (*Withdrawn*).

1657-83-U: Hotel Employees & Restaurant Employees Union, Local 75, (Complainant) v. Richelieu Inn, (Respondent). (*Withdrawn*).

1671-83-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Anchor Machine & Manufacturing Ltd., (Respondent). (*Withdrawn*).

1674-83-U: Toronto Typographical Union No. 91, (Complainant) v. Impressions Advertising, (Respondent). (*Withdrawn*).

1689-83-U: Robert Browett, (Complainant) v. Rubber Workers Union Local 113, (Respondent). (*Withdrawn*).

1717-83-U: Construction Workers Local 53, CLAC, (Complainant) v. Sass Manufacturing Limited, (Respondent). (*Withdrawn*).

1720-83-U: Maurice Wisteff, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Respondent). (*Dismissed*).

1728-83-U: Robert Airdrie, (Complainant) v. The International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local Lodge 275, (Respondent). (*Withdrawn*).

1729-83-U: United Food and Commercial Workers International Union Local P617, (Complainant) v. Tender-Lean Beef Limited, (Respondent). (*Withdrawn*).

1734-83-U: James William Herdman, (Complainant) v. Hotel Employees Restaurant Employees Union, Local 75, Inn on the Park Hotel – Toronto, (Respondent). (*Withdrawn*).

1736-83-U: Fay E. Wilson, (Complainant) v. Ontario Public Service Employees Union, (Respondent). (*Withdrawn*).

1779-83-U: Service Employees International Union, Local 183, AFL, CIO, CLC, (Complainant) v. Cer-A-Met Manufacturing Ltd., (Respondent). (*Withdrawn*).

1817-83-U: Graphic Communications International Union, Local 542, (Complainant) v. L. B. Enterprises 492398 Ontario Limited, (Respondent). (*Withdrawn*).

1822-83-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 and Lucien Gagne, Jean Guy Remillard and Regent Remillard, (Complainants) v. Trans Canada Carpet & Drapery Boutique Ltd., (Respondent). (*Withdrawn*).

1827-83-U: Local 1979, United Food and Commercial Workers' International Union, (Complainant) v. Bata Footwear, Division of Bata Industries Limited and Dennis Kent, (Respondent). (*Withdrawn*).

1854-83-U: Sean Damian Walsh, (Complainant) v. Peel Truck & Trailer, (Respondent). (*Withdrawn*).

1929-83-U: International Ladies Garment Workers Union, (Complainant) v. Sportswear City Limited, (Respondent). (*Withdrawn*).

FINANCIAL STATEMENT

2529-82-M: Edward Miller, (Complainant) v. Fuel Oil and Natural Gas Service Technicians Association, (Respondent). (*Terminated*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0997-83-M: Le Patro d'Ottawa, (Applicant) v. C.U.P.E., Local 2664, (Respondent). (*Dismissed*).

1488-83-M: O.P.E.I.U., Local 290, (Trade Union) v. Hamilton Wentworth Credit Union Limited, (Employer). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1349-83-OH: United Steelworkers of America, Local 3505, (Complainant) v. Slacan, Division of Slater Steel Industries Ltd., (Respondent). (*Withdrawn*).

1589-83-OH: Steve Lawrence, (Complainant) v. Denure's Bus Lines (Chatham Coach Lines), (Respondents). (*Withdrawn*).

1708-83-OH: Jack Vattiata, (Complainant) v. Richard Moriah, Seneca College, (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

0681-83-M: Jacob Immanuel Schochet, (Applicant) v. OPSEU, (Respondent Trade Union) v. Humber College, (Respondent Employer). (*Denied*).

CONSTRUCTION INDUSTRY GRIEVANCE

1437-80-M: Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Inducon Construction (Northern) Inc., Inducon Development Corporation, Inducon Construction of Canada Limited, Desbil Management Inc. and Inducon Design/Build Associates, (Respondents). (*Withdrawn*).

0011-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Inducon Development Corporation, Inducon Construction (Northern) Inc., and Inducon Design/Build Associates, (Respondents). (*Withdrawn*).

0708-82-M; 0709-82-M: International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. Ontario Hydro, (Respondent). (*Dismissed*).

2320-82-M: United Brotherhood of Carpenters & Joiners of America, Local 494, (Applicant) v. Metro Century Construction Ltd., (Respondent). (*Granted*).

0877-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Inducon Construction North-eastern, (Respondent). (*Withdrawn*).

0999-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cochrane Courts System, (Respondent). (*Withdrawn*).

1141-83-M: Labourers' International Union of North America, Local 506, (Applicant) v. Structform Group Inc., (Respondent). (*Granted*).

1293-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 and Nino Blassutta, (Applicants) v. Urban Mechanical Contracting 1979 Ltd., (Respondents). (*Granted*).

1363-83-M: Sheet Metal Workers International Association (Local 235), (Applicant) v. A&G Metro Roofing Ltd., (Respondent). (*Withdrawn*).

1373-83-M: Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Edilu Technical & Engineering Services Ltd., (Respondent). (*Granted*).

1431-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Lin-rin Forming Limited, (Respondent). (*Withdrawn*).

1443-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ferracon Construction Ltd., (Respondent). (*Granted*).

1536-83-M; 1537-83-M: Labourers' International Union of North America, Local 837, (Applicant) v. Beatty-Hall Construction Limited, (Respondent). (*Granted*).

1541-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759, (Applicant) v. Weldland Steel Ltd., (Respondent). (*Granted*).

1542-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, (Applicant) v. S. & D. Steel Products Inc., (Respondent). (*Granted*).

1572-83-M: Sheet Metal Workers' International Association, Local 537, (Applicant) v. Edland Building Systems Limited, (Respondent). (*Granted*).

1590-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of Local Union 463, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Withdrawn*).

1592-83-M: Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. J. L. Wilson & Sons Limited, (Respondent). (*Granted*).

1602-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Losereit Sales & Services Ltd., (Respondent). (*Withdrawn*).

1609-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. O.P.E.C. Acoustic and Drywall Ltd., (Respondent). (*Granted*).

1614-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. K. A. Mace Limited, (Respondent). (*Granted*).

1615-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Vic Starchuk & Associates Inc., (Respondent). (*Withdrawn*).

1618-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Zicardo Concrete & Drain Ltd., (Respondent). (*Granted*).

1620-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Bramalea Limited, (Respondent). (*Withdrawn*).

1636-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Modern Crane Rentals Limited, (Respondent). (*Granted*).

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1732-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. A. Simoes Construction Co. Ltd., (Respondent). (*Withdrawn*).

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0018-82-M: The Ontario Erectors Association, Ralph M. Moore Industrial Installations Limited and Dominion Bridge Company Limited, (Applicants) v. International Association of Bridge Structural and Ornamental Ironworkers Local 786, International Association of Bridge, Structural and Ornamental Ironworkers, the Ironworkers District Council of Ontario, those persons listed Schedule A and V. Boulard, (Respondents). (*Denied*).

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[Editor's Note: This decision was inadvertently omitted from the September, 1981 issue of the Report. However, it is of sufficient importance to be published at this time.]

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BOND PLACE HOTEL; RE FOOD AND SERVICE WORKERS OF CANADA;
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Change in Working Conditions—Discharge for Union Activity—Interference in Trade Unions—Unfair Labour Practice—Pattern of harrassment, discipline, layoff, discharge, surveillance and alteration of working conditions preceding and following certification of union—Board finding series of violations—Directing extensive remedial measures

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IRWIN TOY LIMITED; RE MARVIN MACKAY ET AL; RE UNITED STEEL-WORKERS OF AMERICA AND ITS LOCAL 13571	(July)	1064
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RANTEX BRUSHES INC.; RE UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, LOCAL 542 (July) 1195

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SPERRY VICKERS, DIVISION OF SPERRY INC. CANADA; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 717 (July) 1208

Collective Agreement-Construction Industry Grievance-Whether agreement for use of union label and national minimum standard agreement for commercial pipe fabrication shop collective agreement-Whether constituting voluntary recognition agreement binding respondent employer to provincial agreement

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- VERDI FORMING LIMITED, ONTARIO FORMWORK ASSOCIATION, LABOURERS' UNION, LOCAL 183, RAMPART ENTERPRISES LIMITED AND METRO TORONTO APARTMENT BUILDERS ASSOCIATION; RE LABOURERS' UNION, LOCAL 506; RE FORMWORK COUNCIL OF ONTARIO (Oct.) 1728
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[Editor's Note: This decision was inadvertently omitted from the September, 1981 issue of the Report. However, it is of sufficient importance to be published at this time.]

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ST. JOSEPH NURSING HOME (ROCKLAND) LIMITED; RE CANADIAN UNION OF PUBLIC EMPLOYEES; RE GROUP OF EMPLOYEES (Dec.) 2110

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GOLDEN GRIDDLE RESTAURANT, 470469 ONTARIO LIMITED, C.O.B. AS; RE HOTEL EMPLOYEES UNION, LOCAL 75; GROUP OF EMPLOYEES (Oct.) 1651

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ONTARIO CANCER FOUNDATION, HAMILTON CLINIC; RE CUPE (Feb.) 246

Practice and Procedure-Representation Vote-Person having history of intermittent periods of employment-Not at work on application date or vote date-Board finding person on indefinite lay-off with only tenuous prospects of recall-Not eligible to vote

HURDMAN BROS. LIMITED; RE TEAMSTERS UNION, LOCAL 91 (Feb.) 238

Practice and Procedure-Sale of a Business-Court order appointing receiver and manager prohibiting actions or other proceedings with respect to subject property without leave of Court-Application for declaration of sale held not requiring leave of court

PRICE WATERHOUSE LIMITED AND THE MARITIME LIFE ASSURANCE COMPANY; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220 (Mar.) 441

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PRESCOTT MACHINE AND WELDING INC.; RE ENERGY AND CHEMICAL WORKERS UNION AND ITS LOCAL 1 (Feb.) 250

Practice and Procedure-Trade Union-Unfair Labour Practice-Defeated candidate seeking to set aside election on basis of intimidation and coercion-Board stressing its limited jurisdiction over internal union affairs-Evidence of actual threat of physical or economic harm required to establish intimidation and coercion-Complaint dismissed

- MANONI, FRANK; RE LABOURERS' UNION, LOCAL 527, NELLO SCIPIONI
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- Practice and Procedure–Trade Union–Unfair Labour Practice–Trial Board appointed under
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- WILLIAM EGAN; RE TRIAL BOARD OF THE INTERNATIONAL BROTHER-
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- SILKNIT LIMITED; RE UNITED TEXTILE WORKERS OF AMERICA .. (Nov.) 1913
- Practice and Procedure–Unfair Labour Practice–Respondent not entitled to raise delay where
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- MARINARO, DONATO ET AL; RE LABOURERS' UNION, LOCAL 1089 AND
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- Practice and Procedure–Voluntary Recognition–Application filed within year of recognition–
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- VERNON NURSING HOME SERVICES LIMITED; RE SERVICE EMPLOYEES
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- Ratification–Duty of Fair Representation–Unfair Labour Practice–Union not meeting with
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- MANOR CLEANERS LTD., EMPLOYEES OF; RE TEXTILE PROCESSORS,
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prejudice by delay–Adjournment denied–Change of venue not granted–Employer per-
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Requiring final offer be ratified by employees–Breaking off negotiations before union
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NORTHWEST MERCHANTS LTD. CANADA ET AL; RE RETAIL CLERKS' UNION, LOCAL 409	(July)	1138
<p>Ratification and Strike Vote-Duty of Fair Representation-Unfair Labour Practice-Union recommending acceptance of employer offer-Form of ballot giving members choice between ratification and strike-Choice given informed and realistic in circumstances-Not unfair representation-No intimidation during vote-Notice of vote addressed to "members" of union-Agenda indicating "vote on tentative contract" with no reference to strike-No evidence that employees denied opportunity to vote due to defective notice-Complaint dismissed</p>		
LILO RAIL OF CANADA LIMITED AND MODERN PLATING LIMITED; RE LIBERATO PETTI, HERBERT CLARK, ET AL; RE UNITED STEELWORKERS OF AMERICA	(Sept.)	1496
<p>Reconsideration-Bargaining Rights-Bargaining Unit-Certification-Construction Industry-Trade Union-Reconsideration of earlier Board decision refused-Board not misinterpreting provisions of Act-Board's finding that applicant "affiliated bargaining agent" confirmed</p>		
MANACON CONSTRUCTION LIMITED, ET AL; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, GENERAL WORKERS LOCAL UNION, 1030; RE LABOURERS' UNION, LOCAL 527, ET AL	(July)	1104
<p>Reconsideration-Bargaining Unit-Board decision "mirroring" part-time unit with existing narrow full-time unit-Board not finding grounds for reconsideration</p>		
OTTAWA GENERAL HOSPITAL; RE OPSEU	(Mar.)	434
<p>Reconsideration-Bargaining Unit-Evidence-Natural Justice-Practice and Procedure-Board's usual practice to use application date as cut-off date for evidence of community of interest upheld in oral ruling-No breach of natural justice-Board reviewing policy as to future events-Reconsidering earlier ruling in view of unique circumstances-Permitting evidence of increased work in plant by employees of Engineering Dept. planned for future by decision finalized prior to application</p>		
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Liberation Organization–Applicant claiming religious objection to paying dues to OP-
SEU until it publicly disassociates from OFL resolution–OPSEU having no policy on
issue–No evidence of how OPSEU delegates voted at Convention–Applicant giving
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relation to OPSEU–Dismissed

HUMBER COLLEGE; RE JACOB EMMANUEL SCHOCHET; RE OPSEU
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BECKETT ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF
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Remedies–Arbitration–Discharge for Union Activity–Employer–Interference in Trade Unions–
Unfair Labour Practice–Employer increasing use of temporary workers attempt to un-
dermine union–Union filing grievance alleging temporary workers covered by agree-
ment–Whether subsequent discharges and reduction in hours unlawful–Board finding
respondent employer of employees supplied by employment agencies–Board not de-
fering to arbitration–Union not estopped from claiming relief

K-MART LIMITED; RE TEAMSTERS UNION, LOCAL 419 (May) 649

Remedies–Certification Where Act Contravened–Damages–Discharge for Union Activity–
Evidence–Interference in Trade Unions–Practice and Procedure–Unfair Labour Prac-
tice–Counsel’s request to prohibit publication of evidence denied–Tape recording of
captive audience speech admitted in evidence–Discharge of union organizers not jus-
tified by plant rule prohibiting all solicitation on company premises–Whether lay-offs
motivated by legitimate business reasons–Discharged employees breaching duty to mit-
igate damages by refusing employer’s offer of reinstatement pending Board decision–
Union certified without vote with supportive remedial directions

WILCO-CANADA INC.; RE UAW (June) 989

Remedies–Certification Where Act Contravened–Membership Evidence–Practice and Pro-
cedure–Unfair Labour Practice–Irregularities corrected and disclosed in Form 9–Mem-
bership evidence acceptable–Employee signing card and paying dollar thinking it was

lottery-Union returning dollar and explaining nature of union membership-Subsequently signed card acceptable-Respondent admitting violations after union completed leading evidence-Admission not making evidence before Board irrelevant for purposes of s.8-Union certified without vote-Other remedies included due to nature of violations

BOND PLACE HOTEL; RE FOOD AND SERVICE WORKERS OF CANADA;
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Remedies-Certification Where Act Contravened-Practice and Procedure-Prior decision finding employer unlawful conduct and directing vote with remedial measures-Union losing vote-Alleging unlawful conduct by employer and seeking automatic certification under s.8-Expressly indicating no desire to have further remedies or new vote directed-Board finding no prima facie case for s.8-Dismissing application and imposing bar in view of position taken by union

PRIMO IMPORTING AND DISTRIBUTING CO. LTD.; RE FOOD AND COMMERCIAL WORKERS UNION; PRIMO EMPLOYEES' ASSOCIATION ... (Sept.)

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Remedies-Change in Working Conditions-Duty to Bargain in Good Faith-Interference in Trade Unions-Termination-Unfair Labour Practice-Board finding contracting out breach of freeze provisions and prior settlement-Employees from non-union plant transferred to work side-by-side with unit employees-Paid significantly higher wages-Calculated to undermine union and unduly influence termination vote-Offer to union less than rate paid to non-union-Amounting to bad faith bargaining-Board directing tabling of non-discriminatory retroactive wage offer-New termination vote directed and deferred for three months

IRWIN TOY LIMITED; RE MARVIN MACKAY ET AL; RE UNITED STEELWORKERS OF AMERICA AND ITS LOCAL 13571 (July)

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Remedies-Damages-Duty of Fair Referral-Practice and Procedure-Trade Union-Unfair Labour Practice-No undue delay to cause Board not to inquire-Hiring hall rules not posted or communicated-Out of work list disregarded-Preferential treatment accorded to some members-Records falsified-Violation found and extensive remedies directed against union

PORTISS, JOE; RE LABOURERS' UNION, LOCAL 1089 AND ROCCO D'ANDREA (July)

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Remedies-Damages-Duty of Fair Referral-Unfair Labour Practice-Prior Decision finding unlawful administration of hiring hall-Finding complainant discriminated against in job referrals-Damages calculated on basis of comparison of complainant's earnings with earnings of other active members-Amount reduced for failure to mitigate

PORTISS, JOE; RE LABOURERS' UNION, LOCAL 1089 AND ROCCO D'ANDREA (Sept.)

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Remedies-Damages-Practice and Procedure-Related Employer-Prior Board decision declaring two employers related-Subsequent notice to one employer notice to other also-Prior order amended to reflect related employer status and facilitate enforcement against either employer-1% drop in prime rate since filing date not causing Board to award interest at fluctuating rates

CARROLL ELECTRIC (1982) LIMITED; RE CLAC; RE DEREK MURR (Dec.) 1982

Remedies–Discharge for Union Activity–Duty to Bargain in Good Faith–Interference in Trade Unions–Unfair Labour Practice–Discharges following assault on strike replacements and damage to van–Complaint of grievors who participated in assault dismissed–Grievors merely present at scene of incident reinstated–Failure to testify causing Board to deny compensation–Person causing damage to truck reinstated with no compensation–Person mistakenly believed to have been present at scene reinstated with full compensation–Board reviewing relevance of motive in allegations of interference under s.64–Refusal to discuss discharges not bad faith bargaining

INTERNATIONAL WALLCOVERINGS, A DIVISION OF INTERNATIONAL PAINTS (CANADA) LIMITED; RE CANADIAN PAPERWORKERS' UNION AND ITS LOCAL 305 (Aug.) 1316

Remedies–Duty of Fair Representation–Practice and Procedure–Reconsideration–Prior Board decision finding breach of Act by union–Directing union to refer complainant's grievance to arbitration–Complainant's request to direct retention of independent legal counsel considered and denied–Board remaining seized in event of questions relating to implementation–Complainant's subsequent letter requesting direction to retain independent counsel not raising matter of "implementation"–Failing even if treated as request for reconsideration

BRADLEY, PHILLIP WAYNE; RE CANADIAN PAPERWORKERS' UNION, LOCAL 212 (June) 865

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AMALGAMATED CLOTHING & TEXTILE WORKERS' UNION, LOCAL 1414J, TORONTO JOINT BOARD; RE TIMOTHY W. SMITH AND WILLIAM MORTON (Dec.) 1947

Remedies–Duty of Fair Representation–Unfair Labour Practice–Union interpreting collective agreement as depriving grievor of seniority and recall rights–No reasonable explanation of how interpretation arrived at in face of clear language–Board finding arbitrariness–Directing filing of grievance including arbitration–Requiring union to post Board notice and mail copy to each employee–Discussion of duty as applying to employee seniority rights

SAVAGE SHOES LTD.; RE SUSAN G. BARTLETT; RE AMALGAMATED CLOTHING AND TEXTILE UNION, LOCAL 307 (Dec.) 2067

Remedies–Health and Safety–Grievance abandoned at first stage–Complaint under OHSA not barred–Supervisor not communicating complainants' safety reasons for refusal to higher management–Discharges unlawful–Board finding one week suspension of complainant warranted because of post-discharge misconduct

BLACK & MCDONALD LTD.; RE ROBERT GILL & DAVID HUSSEY .. (Dec.)	1971
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FILTRAN LIMITED; RE IBEW, LOCAL 2228	(Oct.)	1647
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CARROLL ELECTRIC (1982) LIMITED; RE J.B. CARROLL ELECTRIC LIM-
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- BUNTIN REID PAPER, ALEX SMITH, PRESIDENT; RE LINDA WARNER; RE OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 343 (Apr.) 487
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- OTTAWA COMMERCIAL REALTIES LIMITED; RE M. A. SAMPLE; RE TEAMSTERS UNION, LOCAL 91; RE GROUP OF EMPLOYEES (Nov.) 1877
- Termination-Petition-Union steward suspended day prior to circulation of petition-Whether affecting voluntariness of petition-Whether admission that suspension unlawful and apology in notice posted curing taint
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- APEX SERVICES; RE JOHN HEENEY; LABOURERS INTERNATIONAL UNION, LOCAL 183 (Jan.) 1
- Termination-Practice and Procedure-Reconsideration-Union responding to termination application by advising Board it no longer desired representation-Board terminating bargaining rights under s.57(5)-Union claiming earlier response result of misinformation and seeking reconsideration and direction of vote-Union required to bear consequence of response made hastily and without adequate investigation-No reconsideration
- UNITED STEELWORKERS OF AMERICA; RE EMILIO CAMPEA AND GEORGE OHMAN (Nov.) 1938
- Termination-Reconsideration-Prior Board decision finding termination application untimely-Board confirming that appointment of conciliator valid and not affected by *Bill 179*-Reconsideration application denied

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THUNDER BAY, THE CORPORATION OF THE CITY OF; RE MAURIE AKHOKAS ET AL; RE CUPE, LOCAL 87 ET AL; RE CUPE, GRACE HARTMAN ET AL; RE MUNICIPAL TECHNICIANS ASSOCIATION OF THE CITY OF THUNDER BAY (May) 781

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